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MONTANA PROSECUTOR

JULY - AUGUST, 1979 Vol 3, No. 3

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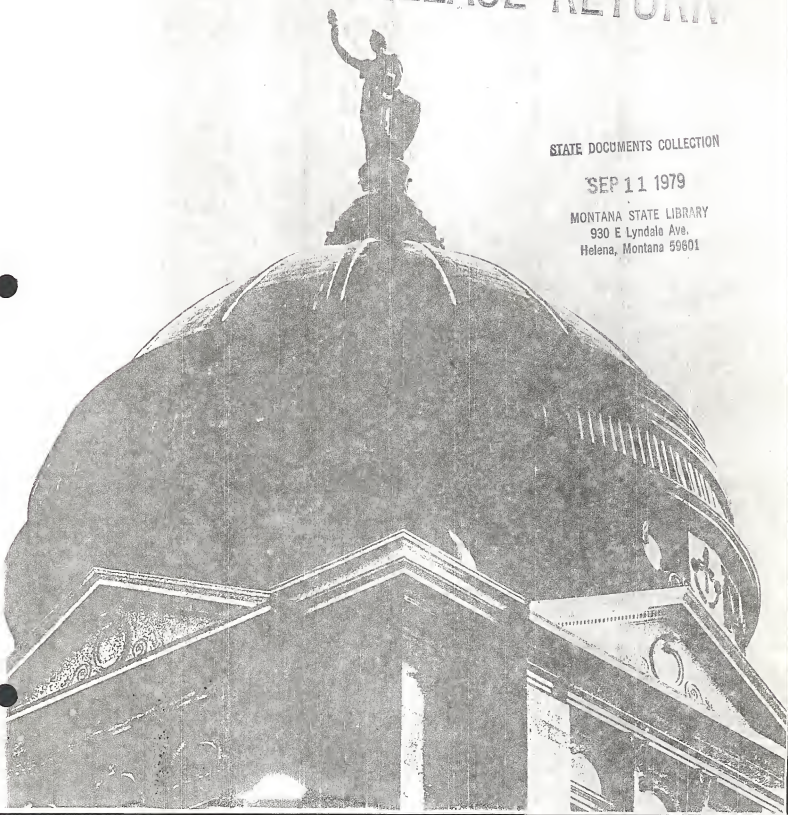


INTRODUCTORY NOTES

Included within this issue is a memorandum from Claire Engel, State Law Librarian, concerning the Current Awareness Service for County Attorneys provided by the State Law Library. The Current Awareness Service is an innovative effort to provide criminal justice personnel with recent legal reference materials of interest. The service can be utilized by all county attorneys in an effort to improve the quality of services they provide as county attorneys.

Also included within this issue is a memorandum prepared by Gallatin Deputy County Attorney Pete Dunbar concerning oral search warrants, an article from the FBI Law Enforcement Bulletin, entitled "Informants and the Right to Counsel", and information concerning the use of N.C.I.C. In reference to the use of N.C.I.C. there are two informational documents enclosed. The first is entitled "Extradition of Wanted Persons and the National Crime Information Center". It is critical that every county attorney and deputy county attorney become familiar with its contents in order to prevent misuse of the system and avoid subjecting local political subdivisions to financial liability for such misuse. In the near future, Marlene Vaughn, Chief of the L.E.T.S. Bureau of the Montana Department of Justice will be calling each prosecutor to discuss those problem areas mentioned in the memorandum. The second document concerning the use of N.C.I.C. is entitled the Montana Law Enforcement Telecommunications System which is enclosed for informational purposes.

At the Montana County Attorneys Association convention at Fairmont Hot Springs, July 25-28, 1979 it was decided by the membership that the County Prosecutor Services Bureau would apply for only $2,500.00 for out-of-state training for prosecutors. The remainder of any funds allocated by the Board of Crime Control will be dedicated to in-state training. Additionally, the Association members voted to have applications for out-of-state training approved by the Association's training committee prior to allocation of any funds and to call for a fifty percent (50%) local match on all applications for out-of-state training. The Board of Crime Control will consider the aforementioned grant application for $2,500.00 at its October, 1979 meeting. As a result, funds for out-of-state training will not be available until November 1, 1979 and applications will be subject to the aforementioned restrictions.

Pursuant to requests received at the convention, plans are being formulated to present a detailed Vehicular Homicide/ DWI training seminar in cooperation with Northwestern University (The Traffic Institute) on December 6th and 7th, 1979 in Billings, Montana. An application to secure the funds to present the seminar has been submitted to the Highway Traffic Safety Division of the Department of Community Affairs.

It is comtemplated that per diem and mileage expenses for each participant will be covered by the grant. A final decision on the application will be made by October 1, 1979 and all county attorneys will be notified of that decision as soon as possible thereafter.

Effective September 7, 1979 County Prosecutor Services Bureau will be located in room 371 of the Scott Hart Building, 303 Roberts, Helena, Montana 59601. The telephone number will remain the same, 449-3816.

RECENT CASES AND NOTES

APPEAL - DEATH

Defendant's death moots the appeal, and the case is remanded with instructions to dismiss the appeal. Defendant's estate was not a party to the criminal action so the issue of whether his fine and restitution should be refunded is left for another day. State v. Griffin (Ariz.) 592 P.2d 372.

FORFEITURE

For numerous facts amounting to sufficient evidence to sustain the forfeiture, even though no one actually saw narcotics in the vehicle and there were no narcotics in the vehicle when it was taken into custody, see Matter of One 1974 Mercedes Benz, Etc. (Ariz.) 592 P.2d 383.

A clause in the plea agreement stating that the agreement didn't affect forfeiture proceedings, if applicable, was not ambiguous. The opinion also holds that forfeiture of a vehicle used to transport marijuana for personal use is proper. Matter of One 1969 Chev. 2-Door, Etc. (Ariz.) 591 P.2d 1309.

AGE PRESUMPTIONS

Defendant's appearance at trial in criminal court, rather than in a juvenile proceeding, raises a rebuttable presumption that defendant was over 16 years old. Age is not an issue unless defendant raises it via a motion to dismiss. Thompson v. State (Ga.) 386 N.E.2d 682.

ALIBI

Evidence which merely makes defendant unaccounted for at the time of the crime is insufficient to require the trial court sua sponte to charge on alibi. Gardner v. State (Del.) 397 A.2d 1372.

ALLEN CHARGE

Use of the Allen charge is upheld by the Fifth Circuit in United State v. Dixon (5th Cir.) 593 F.2d 626.

ARREST - SEARCH & SEIZURE

Officers armed with arrest warrants, who knew that the house was a narcotics center, heard noise on the second story; the officers reasonably believed that the occupants were refusing to come to the door to be arrested, and were justified in forcing entry, even though the noise turned out to be a radio. Once inside they looked for people, not evidence; since the entry was justified, seizure of a telephone address book in plain view is upheld. United States v. Phillips (4th Cir.) 593 F.2d 553.

COMPETENCE - COUNSEL

Failure to hold a pretrial hearing to determine whether defendant was competent to waive counsel constituted reversible error. United States v. Aponte (9th Cir.) 591 F.2d 1247.

BUSINESS RECORD

An autopsy report was admissible under the business records exception, even though the pathologist who performed the autopsy was not present at trial. The pathologist's supervisor testified that a copy of the report was kept in his office as a matter of course, and he kept the report under his supervision. The supervisor stated that the report was a document maintained and relied upon in the normal course of his business, and he recognized the report as having been made by another doctor, a pathologist under his supervision. Thompson v. State (Ind.) 386 N.E.2d 682.

COMMENT ON SILENCE - MIRANDA

Asking defendant several times if he told the officers the same story he told at trial was an impeachment by contradiction, since the defendant told the arresting officers a different story than he told at trial. The questions were not an impermissible comment on defendant remaining silent after Miranda. People v. Rehbein (Ill.) 386 N.E.2d 39.

CONFRONTATION

Videotaping the deposition of a witness who had mental problems as a result of appellant's crime, violated defendant's right of confrontation where defendant was not allowed to be physically present at the deposition and the witness was deceived about his presence in the building. Although defendant could see and hear the deposition through a window and communicate with the defense attorney, this was inadequate confrontation. United States v. Benfield (8th Cir.) 593 F.2d 815.

CRIMINAL TRESPASS

The statute making it unlawful for a person to enter upon land or premises of another person after receiving notice that entry is forbidden is neither vague nor ambiguous and did not deny defendant Due Process. State v. Raybon (Ga.) 252 S.E.2d 417.

DISCOVERY

Prosecutor had a duty to disclose to defense attorney correspondence between the prosecutor and the parole board advising of the cooperation of a prosecution witness and expressing hope that such cooperation would be taken into account when the witness was considered for parole. (It didn't help that the prosecutor denied the existence of the letter - which he had written.) People v. Cwikla (N.Y.) 386 N.E.2d 1070.

ENTRAPMENT

For a long discussion on the issue of entrapment, see United States v. Burkley (D.C.Cir.) 591 F.2d 903.

DIRECTED VERDICT

Once trial court grants motion for a directed verdict, judge is prohibited by constitutional guarantees of Double Jeopardy, from thereafter entertaining additional argument and then setting aside his ruling and continuing trial. State v. Hurst (La.) 367 So.2d 1180.

EVIDENCE - PREJUDICE

"Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value", which is excluded by Rule 403 (Emphasis in Original). "Unless trials are to be conducted on scenarios, or unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing". United States v. McRae (5th Cir.) 593 F.2d 700.

HEARSAY

In order for out of court statements to be admissible under the conspiracy exception to the hearsay rule, the State must show that the statements were made in furtherance of the conspiracy. United States v. Eubanks (9th Cir.) 591 F.2d 513.

HOMICIDE - LESSER INCLUDED OFFENSES

Submitting a voluntary manslaughter instruction was error since the evidence that appellant calmly bought a gun and went over to shoot his ex-wife made it murder or nothing, so defendant's conviction for voluntary manslaughter is reversed. Fortunately, he was also charged with aggravated burglary, so he didn't quite get away with murder. State v. Castro (N.M.App.) 592 P.2d 185.

INFORMANT

The information from, as well as the identity of, an informant who is not a material witness is privileged and not subject to disclosure where the information may lead to the identity of the informant. People v. Sotelo (App.) 153 Cal.Rptr. 348.

JUDGE - BIAS

A trial judge's statement that he was rejecting the guilty plea because defendant was either a murderer or insane, and the psychiatric reports said defendant was same, was not grounds to disqualify the judge. Sober v. District Court, Etc. (Colo.) 592 P.2d 400.

JUDGES

Neither defendant's constitutional right to a jury trial nor his right to Due Process was violated by the trial court's failure to advise defendant that the judge had presided at the earlier trial of a co-conspirator. There was no ground for disqualification of the judge raised thereby and no prejudice to defendant. Wyatt v. United States (4th Cir.) 591 F.2d 260.

LESSER INCLUDED OFFENSES

Where trial court erred in failing to instruct on lesser included offense, error can be cured by modifying judgment of conviction and reimposition of sentence for the lesser offense. The State, however, has a right to a trial on the greater offense, and may elect to retry the entire case. Oney v. State (Del.) 397 A.2d 1374.

LINE-UP

Defendant had no Sixth Amendment right to counsel at line-up where, although he was in custody, his custody was the result of an unrelated indictment, the identification was not used in that other case, and the Government had not yet decided to indict defendant for the present offense. United States v. Tyler (5th Cir.) 592 F.2d 261.

MOTION FOR DIRECTED VERDICT

A defendant who moves for a judgement of acquittal on the ground that the prosecution failed to prove a prima facie case in its case in chief need not state the specific grounds for his motion and thereby create the possibility of the State reopening its case to fill the gaps recognized by defense attorney. People v. Bleton (Sup.) 153 Cal. Rptr. 195.

PLEA NEGOTIATIONS

Even if defendant agreed to "cooperate" in return for dropping of state charges, his confession made in the course of his cooperating would be admissible as defendant was not, and did not, show an intention to plead guilty. Rather, defendant evinced only his intention to "cooperate". Of course, the jury should be apprised of the circumstances surrounding defendant's confession in its determination of voluntariness. United States v. Watson (5th Cir.) 591 F.2d 1058.

PRETRIAL PUBLICITY

Where all of the statements made in newspaper articles to which some of the jurors were exposed related to facts which were subsequently introduced at trial, court did not err in denying a motion for mistrial based on the fact that some of the jurors had been exposed to newspaper articles containing accounts of preliminary hearing testimony. State v. Olson (N.D.) 274 N.W.2d 190.

SENTENCE

Designating defendant as a habitual offender because of numerous felony convictions was proper, even though this was the first time defendant had ever been sent to prison. State v. Robertson (Kan.) 592 P.2d 460.

RANGE OF SENTENCING

A trial court may forbid discussion of a punishment absolutely fixed by statute during all stages of the trial. Lake v. State (Texas Cr.App.) 577 S.W.2d 245.

SEARCH & SEIZURE

The common areas of an apartment building, even if they are kept locked and guarded by a doorman, are not places where tenants have a reasonable expectation of privacy. Where government agents gained entry to the building through the voluntary and unintimidated consent of the doorman, they were properly on the premises and there was no Fourth Amendment violation. (Good case) United States v. Moore (S.D.N.Y.) 463 F.Supp. 1266.

THREATS BY DEFENDANT

Evidence that defendant confronted the State's witness outside the courtroom and told the witness to drop the charges against defendant was admissible, even though it did relate to an extraneous offense, because it was probative of guilt. Campbell v. State (Texas Cr. App.) 577 S.W.2d 491.

ASSAULT WITH DEADLY WEAPON - INSTRUCTIONS

"[I]ntent to actually harm is not an element of assault with a deadly weapon", so a jury instruction (verbatim in opinion) that holding a deadly weapon in a threatening manner within striking distance and with ability to injure constitutes Assault with a Deadly Weapon was correct. State v. Bustamonte (Ariz.) 593 P.2d 659.

DOGS - EVIDENCE

Evidence of the dog's training, preservation of tracks at the crime scene, and the course of the actual tracking was sufficient foundation to admit the fact the dog tracked defendant from the crime scene to where he was caught. Although a record of the past failures of the dog should have been kept to insure the continued reliability of the dog, failure to do so did not make the foundation insufficient. State v. Coleman (Ariz.) 593 P.2d 684.

SEARCH & SEIZURE

Officers, comparing the soles of defendant's shoes to tracks at the crime scene, were merely comparing physical characteristics in which defendant lacked a reasonable expectation of privacy. The "search" was not a condemned dragnet type search since defendant matched the victim's description and a tracking dog tracked the criminal from the scene to defendant's location. State v. Coleman (Ariz.) 593 P.2d 684.

ACQUITTAL

By presenting evidence after moving for a directed verdict, defendant waives any error in denying the motion, and the court should consider all evidence, including the defense case, if the motion is renewed after the defense rests. State v. Blue (Kan.) 592 P.2d 897.

AIDING AND ABETTING

Driver of a "getaway car" could be convicted of aiding and abetting bank robbery, however, conviction for aiding bank robber who "assaults any person...by the use of a deadly weapon" was unsupported absent evidence reasonably showing defendant knew that his accomplice was armed and intended to use weapon and defendant intended to aid him in that respect. (Federal statute decision). United States v. Jones (9th Cir.) 592 F.2d 1038.

BUSINESS RECORDS

Under business records exception to hearsay rule, Rule 803(6), it is not essential that witness by whom records are offered be recorder or even know who recorder was. Rather, it is sufficient for witness to identify records as authentic and testify that such record was created and preserved in regular course of business. United States v. Verlin (N.D. Texas) 466 F.Supp. 155.

COMMUNITY STANDARDS

In obscenity trial, community standards may be proven, like speed of an automobile or reputation of an individual, by a qualified lay witness, qualified by experience rather than by training. Because the jury may also be as able to determine community standards as the witness, unlike speed or reputation, the trial court may require a greater showing of "qualification" before allowing the witness to render an opinion. State v. Short (La.) 368 So.2d 1078.

CONSENT

Although travel diary belonged to defendant, where girl friend had been permitted to make a number of entries in it, she had demonstrated sufficient common authority over diary to allow her to give valid consent to its search and seizure. United States v. Rivera (S.D.N.Y.) 465 F.Supp. 402.

CROSS-EXAMINATION

The court did not abuse its discretion in refusing to grant a mistrial when the prosecutor asked a witness whether the defense attorney had suborned him to commit perjury (Prosecutor had a witness to the attempt.) State v. Freitas (R.I.) 399 A.2d 1217.

CUSTODY

A defendant whose appeal for a stay had been turned down, and who had been present when the judge orally ordered the sentence to begin "now", was in custody so that he could be charged with escape for failing to report to the marshall's office as ordered. United States v. Jones (9th Cir.) 592 F.2d 1038.

DWI

Evidence that DWI defendant had consented to take breath test, but then tried to avoid detection by only pretending to take test was not inadmissible as evidence of a refusal to take test, but rather was admissible as evidence of conduct indicative of guilt. Wells v. State (Texas Cr. App.) 578 S.W.2d 118.

DOUBLE JEOPARDY

DWI and vehicular manslaughter are separate and distinct offenses and a conviction for each offense is not barred by double jeopardy. Lloyd v. State (MD.App.) 399 A.2d 932.

A bailiff's improper and prejudicial misconduct, which required a mistrial, was not condoned by the judge or prosecutor and therefore double jeopardy did not prevent a retrial after the mistrial. State v. Rathbun (Ore.App.) 586 P.2d 1136.

HOMICIDE - EVIDENCE

Evidence that the homicide victim's ex-husband had threatened the victim several years previously was properly rejected since the husband wasn't living with the victim at the time and wasn't connected to the crime. People v. Romero (Colo.App.) 593 P.2d 365.

HYPNOSIS

Use of hypnosis to help victim remember license number of car used by robber did not per se invalidate victim's identification of defendant as robber, and where there was no assertion that identification was result of hypnotic suggestion, testimony was valid. People v. Colligan (App.) 154 Cal.Rptr. 389.

IDENTITY

Where eyewitness' testimony described assailant as a very heavy man who had a full beard and long hair, photograph of defendant at time of offense was admissible where defendant at time of trial was slender, clean-shaven and had short hair. State v. Ruof (N.C.) 252 S.E.2d 720.

IDENTIFICATION - CONTEMPT OF COURT

A defense attorney who substituted another woman for the defendant at counsel table during preliminary hearing committed direct criminal contempt of court. Miskovsky v. State ex rel. Jones (Okl.Cr.) 586 P.2d 1104.

IMMUNITY

Defendant, a former Congressman, has no standing to protest government's granting of immunity to key prosecution witness (Tong Sun Park) where immunity was conditioned upon his giving truthful and candid testimony. United States v. Passman (W.D.La.) 465 F.Supp. 736.

Law enforcement officers are totally lacking in power to authorize or grant immunity from arrest or prosecution. Any right not to be prosecuted because of such a promise of immunity is equitable only. Breach of such a promise cannot be pled in bar of an indictment, nor as grounds for reversal on appeal. Yarboer v. State (Al.Cr.App.) 368 So.2d 868, cert. denied 368 So.2d 871.

INFERENCES

For an approved verbatim instruction on the inference arising from possession of stolen property, which deals with defendant's right to remain silent, etc. and which could be given in a robbery case, see the appendix in Wells v. People (Colo.) 592 P.2d 1321.

INFERENCES - SUFFICIENT EVIDENCE

The inference, that one who breaks into another's property at night does so with intent to steal, was strengthened by the inference drawn from attempted concealment and the inference drawn from an attempt to break into a building that defendant knew the contents of. All these inferences were sufficient to support defendant's conviction for entry with intent to steal. Mirich v. State (Wyo.) 593 P.2d 590.

INSTRUCTIONS

Where the testimony of two arresting officers would only have been cumulative, the prosecution's failure to call them did not entitle the defense to an adverse inference instruction. Commonwealth v. Barnosky (Pa.Super.) 400 A.2d 168.

MOTION TO SUPPRESS

A defendant who called a police officer to sustain his burden of going forward on his motion to suppress, could not complain when the state relied upon cross-examination of the officer to show the legality of the search. It was the state who assumed the risk of not calling any other witnesses or presenting any other evidence. State v. Eillis (Idaho) 586 P.2d 1050.

PLEA AGREEMENT

Where State agreed to charge defendant with lesser crime in return for plea of guilty, State could later charge defendant with greater offense resulting in a longer sentence after defendant had successfully appealed and reversed his conviction on lower charge. (Judge Moylan - "...appeallant with his initial guilty plea, 'bought' leniency and then stopped payment on the check." Sweetwine v. State (Md.Sp.App.) 398 A.2d 1262.

PROBABLE CAUSE

Circumstances and conduct which may very well not excite the suspicions of an ordinary person might be highly significant to a trained law enforcement officer, so that a furtive gesture, coupled with prior reliable information, may constitute probable cause for a search or arrest. State v. Booth (Neb.) 276 N.W.2d 673.

PROSECUTOR - SENTENCE

A prosecutor may properly address the court and make a sentencing recommendation. Although an early ABA draft of Standards Relating to the Prosecutor Function prohibited such a practice, a later draft said that where the court sentences without jury participation the prosecutor should be given the chance to address the court and make a recommendation. State v. Pierce (Idaho) 593 P.2d 392.

PSYCHIATRIC EXAMINATION

Prosecution's pre-trial psychiatric examination of defendant is neither a custodial interrogation nor a critical stage, so Miranda warnings need not be given and counsel need not be present. Davis v. Campbell (E.D.Ark.) 465 F.Supp. 1039.

RELIGIOUS PRIVILEGE

Defendant's religion, which supposedly forbade defendant from testifying against another member of the religion, did not relieve him from his political responsibilities and was outweighed by a compelling state interest in the effective operation of a court of justice, so that defendant was properly convicted of contempt for his refusal to testify. State v. Bing (S.C.) 253 S.E.2d 101.

RIGHT OF PRIVACY

Statute permitting police access to bank records without probable cause does not violate Constitutional guarantee of privacy since such right does not extend to customer using bank account to defraud bank. People v. Muchmore (App.) 154 Cal.Rptr. 488.

SEARCH & SEIZURE

Where officers were in defendant's house searching for defendant, who was a burglary suspect, an officer was entitled to lift a mattress when he thought he saw a gun butt protruding from under it, revealing three gun cases. After getting a description of the stolen guns, the officers were entitled to open the cases to verify the guns were the stolen weapons and to insure the guns weren't used against the officers by defendant, who was still at large. State v. Moore (N.M.App.) 593 P.2d 760.

SELECTIVE ENFORCEMENT - PROSTITUTION

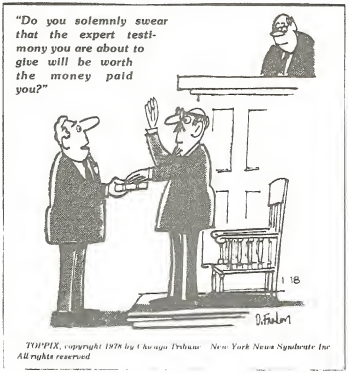
Failure to prosecute police officers who allegedly engaged in illegal acts with defendant does not bar defendant's prosecution for prostitution on selective enforcement grounds. Bell v. State (Fla.) 369 So.2d 932.

SPEEDY TRIAL

Mere fact that prosecutor waits to see how long defendant serves on a prior offense before charging him with another crime does not deny defendant due process. State v. FCR (Minn.) 276 N.W.2d 636.

WITNESSES - PRELIMINARY HEARING

Defendant had no absolute right to put six-year-old prosecutrix on stand at preliminary hearing where defendant had no reasonable belief her testimony would be helpful or meaningful and the only purpose was to possibly create inconsistent testimony, so court's desire to protect child from trauma of testifying was upheld. People v. Robinson (App.) 154 Cal.Rptr. 395.


"Do you solemnly swear that the expert testimony you are about to give will be worth the money paid you?"
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ARGUMENT

Arguing that witness demeanor was important, and the jury should remember defendant's violent temper and his outburst in court was a proper comment since the defendant testified and the outbreak apparently occurred in front of the jury. State v. Smith (Ariz.) 592 P.2d 1316.

Argument that the jury should remember how the defendant, who did not testify, looked when the rape victim testified and when she identified him was not reversible error. In the supplemental opinion, the court of appeals said that failure to object prior to the jury retiring constituted waiver. State v. Suells (Ariz.) 592 P.2d 1274.

COMMENT ON SILENCE

Cross-examining both defendants about their silence after arrest, but prior to Miranda, constituted a violation of their right to remain silent and was reversible error. State v. Rios (Ariz.) 592 P.2d 1299.

DRUGS AND NARCOTICS

Appellant's conviction for transporting marijuana was not invalid because the state failed to establish the species of marijuana that they transported. The statute forbids the transportation of any marijuana. State v. Rios (Ariz.) 592 P.2d 1299.

EVIDENCE

Tape recordings of defendants' statements, made after the supposed occurrence of murders which they had paid other individuals to commit, were properly admitted. Statements by conspirators made while attempting to cover up the conspiracy are admissible. State v. Kennedy (Ariz.) 592 P.2d 1288.

EVIDENCE - STOLEN GOODS

Returning stolen items seized from defendant to the rightful owners and admitting pictures of the items did not violate either the best evidence rule or Brady in the case against defendant for receiving stolen goods. Returning the items defendant had for months did not deprive defendant of his right to examine, and since the evidence wasn't suppressed or exculpatory, there was no Brady violation. State v. Smith (Ariz.) 593 P.2d 281.

PLEA OF AGREEMENTS - APPEAL

Conditions in plea agreements requiring defendants to give up their right to appeal will not be enforced, as a matter of public policy. (A phyrric victory, he lost the appeal). State v. Ethington (Ariz.) 592 P.2d 768.

MIRANDA

An officer who asked what happened when he came on the scene of a double shooting was merely conducting on-the-scene investigation, so the woman's answer that she shot both of them was admissible despite the fact she hadn't been given Miranda. She was lying on her hands, the officer was entitled to ask where the gun was to protect himself and others, so that answer was admissible without Miranda also. The woman volunteered that she had shot another person but hadn't been convicted. All three statements were properly admitted. State v. Heath (Ariz.) 592 P.2d 1302.

SEARCH & SEIZURE

Officers, who called headquarters to see if a machine with an obliterated serial number was the one listed in the warrant, and discovered the machine was not in the warrant but was stolen, were entitled to seize it. Two motorcycles were seized although motorcycles were not named in the warrant. The seizure of one with an obviously visible obliterated serial number was upheld, but seizure of a motorcycle which officers couldn't tell was stolen without a close and detailed examination was not upheld. State v. Smith (Ariz.) 593 P.2d 281.

SEARCH WARRANT - INFORMANTS

Five to nine month old information that defendant received stolen property was not too old, since the information stated defendant planned to use the equipment in his retail business and an officer saw similar machines on defendant's premises. The fact that the informant was identified by name and that the officers corroborated part of his story was sufficient evidence that the informant and information were reliable. State v. Smith (Ariz.) 593 P.2d 281.

SENTENCE - DISMISSED CHARGES

Where all the charges arose out of a single transaction the trial court could consider charges dismissed by the plea agreement. Various other alleged sentencing irregularities were not supported by the record, the case contains a definition of abuse of discretion for sentencing purposes. State v. Ethington (Ariz.) 592 P.2d 768.

WEAPONS

A 14-inch long prison-made "shank" (knife) was a deadly weapon as a matter of law. State v. Turrentine (Ariz.) 592 F.2d 1305.

DWI - VIDEOTAPE

Defendant had no right to counsel when she was given videotaped field sobriety tests. Anchorage v. Geber (Alaska) 592 P.2d 1187.

COMPETING HARMS DEFENSE

The competing harms defense is not put in issue by defendant's subjective belief that threat of imminent physical harm to person or property exists. There must in fact be a showing that such an imminent harm exists and defendant has burden to show the existence of that fact. (Belief by defendant that nuclear power plant endangered the workers there insufficient to exculpate defendant.) State v. Kee (Me.) 398 A.2d 384.

DEFENDANT'S ABSENCE

Defendant was not prejudiced by not being present when videotaped orientation presentation was shown to prospective jurors who had not yet been empaneled. The judge did not refer to particular cases but only made general comments introducing the jury candidates to facts concerning jury service. Tyson v. State (Ind.) 386 N.E.2d 1185.

DYING DECLARATION

Statement made by severe burn victim 1 1/2 hours after her conflagration was admissible as a dying declaration, even though declarant did not die until one month later, where at time of statement, victim said she was going to die. Commonwealth v. Stickle (Pa.) 398 A.2d 957.

FELONY - MURDER - PROMISES

Robber of 74-year-old victim was properly convicted for felony-murder when victim dies soon afterwards, where medical expert testified that emotional and physical stress of robbery led to victim's death. Further, telling defendant it would be better for him to get it off his chest, to tell the police all the details was not a promise of immunity. Booker v. State (Ind.) 386 N.E.2d 1198.

INSTRUCTIONS

Trial court committed reversible error when it refused to give defendant's requested instruction on the legal effect of defendant's exercise of his constitutional right to refuse to testify in his own behalf. Issue relates to a fundamental right, so it cannot be harmless error. Perry v. State (Ala.) 368 So.2d 310.

MIRANDA

Removing an intoxicated and suicidal person to a detoxification center constitutes an arrest which requires giving of Miranda warnings before any police questioning. Although initial questioning was therefore invalid no incriminating statements were made until after Miranda had been given, so the statements were admissible. State v. Sickels (Minn.) 275 N.W.2d 809.

JUDGES

Although trial judge was deeply involved in negotiations which preceeded unindicted accomplice's agreement to testify, defendant was not denied his right to an impartial judge where trial judge held no preconceived notions of defendant's guilt or innocence. The jury was informed of the promises made to the witness, defendant was given full opportunity for cross-examination, and the jury was properly instructed on accomplice testimony. State v. Dufield (N.H.) 398 A.2d 818.

RAPE

Where resistance would obviously be useless, fruitless, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the victim's opposition and lack of consent. State v. Pankey (Neb.) 276 N.W.2d 233.

VALUE

Although there was testimony regarding the purchase price and date of purchase of the items seized, where no property was introduced into evidence and there was a fatal lack of testimony from the owners or any expert regarding the value of the stolen property at the time of the burglary, the government failed to prove value of the property received by defendant. Comber v. United States (D.C. Cir.) 398 A.2d 25.

"Plus th' fact - how was I t' know they were 'off-duty' cops!"

BREATHALYZER AMPOULES

The breathalyzer ampoules must be preserved in DWI cases, although they need not be frozen. Failure to preserve the ampoules means the results will be suppressed. Scales v. City Court of Mesa (Ariz.) 594 P.2d 97.

CONFLICT OF INTEREST

Counsel doesn't have to withdraw until a conflict arises or can be reasonably forseen. Defendant's theoretical conflict of interest was unsupported by the evidence and was not grounds for reversal. State v. Williams (Ariz.) 593 P.2d 896.

CONFRONTATION

The trial court's failure to attempt to subpoena defendant's husband from a California jail was reversible error since the husband admitted that he alone stole the vehicle defendant was charged with stealing. Interrogatories, in which the husband admitted stealing the car without telling defendant the car was stolen, were insufficient, the jury was entitled to weigh the husband's demeanor as he testified. State v. Brady (Ariz.) 594 P.2d 94.

DISCLOSURE

Exclusion of a witness to the non-disclosed defense of intoxication was not an abuse of discretion. Defendant was not prejudiced, excluding evidence that he was intoxicated seven hours before the crime did not deprive him of a fair trial. State v. Edwards (Ariz.) 594 P.2d 72.

FELONY MURDER - DOUBLE PUNISHMENT

The death of the victim during a robbery constitutes felony murder, whether the death is intentional or accidental, so the victim dying of a heart attack during the robbery constituted felony murder. The felony murder, robbery and burglary convictions did not violate double punishment. State v. Edwards (Ariz.) 594 P.2d 72

HUSBAND/WIFE PRIVILEGE

The spousal privilege doesn't cover crimes against the wife, and killing the child of the wife constitutes a crime against the wife. Therefore, neither the husband nor the wife could prevent the State from calling the wife to testify against her husband, who was charged with killing their child. State v. Figueroa (Ariz. App.) 593 P.2d 940.

GUILTY PLEA

Lack of indication in the record that defendant was aware he would have to serve the minimum sentence for a child molestation guilty plea resulted in a remand to see of he was aware of the special sentencing provision. State v. Dishong (Ariz.) 594 P.2d 84.

JAIL CLOTHES

Defendant's claim that he was forced to stand trial in jail/prison clothes is defeated because he failed to make a record showing that the clothes were identifiable as jail/prison clothes. State v. Edwards (Ariz.) 594 P.2d 72.

MIRANDA

A defendant who has asked for an attorney may later be rewarned and questioned, without an attorney being present, as long as defendant's right to cut off questioning is scrupulously honored. To create per se rules that defendant couldn't be questioned at all or questioned without an attorney after he invoked Miranda would create an inflexible situation where defendant would be imprisoned by his own rights. State v. Edwards (Ariz.) 594 P.2d 72.

SPEEDY TRIAL

A four month delay while the State appealed an order to reindict defendant didn't violate his speedy trial rights. Although defendant claimed that he lost two alibi witnesses he called the alibi witness in whose sole presence he was during the robbery. State v. Edwards (Ariz.) 594 P.2d 72.

COUNSEL - CONFLICT OF INTEREST

Defendant was not denied effective assistance of counsel when the appointed public defender who represented him at trial had successfully prosecuted him on another matter four and one-half years earlier. People v. Franklin (Ill.) 387 N.E.2d 685.

EVIDENCE DESTRUCTION - INVESTIGATION

Where defendant was arrested while leaving the crime scene with the stolen goods in his hands the police were not required to preserve allegedly exculpatory glass fragments found on his clothes. Police are not required to conduct an in-depth investigation of every case, and they don't have to preserve evidence that is unnecessary to the investigation "nor likely to benefit the defendant." People v. Perex (Cal.) 594 P.2d 1.

HEARSAY - ENTRAPMENT

Where defendant raised the defense of entrapment and claimed lack of predisposition, an officer's uncorroborated testimony that he had learned through informants that defendant had a reputation as a marijuana dealer was admissible. United States v. Wolffs (5th Cir.) 594 F.2d 77.

INSTRUCTIONS - APPEAL

Although the trial court has a duty to instruct on lesser included offenses, failure to do so is invited error where the defense opposes the lesser instruction as part of an all or nothing strategy. State v. Lopez (Idaho) 593 P.2d 1003.

MIRANDA

Where the individual being questioned indicates that he does not wish to talk without the presence of an attorney and the officer, seeking only clarification of the individual's intention not to talk, asks an additional question for that purpose, and the individual answers the question by agreeing to talk, his answer constitutes a waiver of his prior request for an attorney. State v. Weinacht (Neb.) 277 N.W.2d 567.

PRIOR BAD ACTS

Evidence that defendant had recently been in prison was properly admitted in his trial for rape, even though he later took the stand and claimed consent. At the time the evidence was admitted, the State had to prove the identity of the masked rapist, who had said he had just been released from prison. State v. McCormick (Idaho) 594 P.2d 149.

A rape victim's testimony that she had seen defendant going through her purse prior to the rape was admissible to show the victim's familiarity with the defendant for identification purposes and to show defendant's motive and intent to do physical harm to the victim. Choctaw v. State (Ind.) 387 N.E.2d 1305.

SPEEDY TRIAL - PROMISES

Defendant's right to a speedy trial was not violated by a two and one-half year delay between indictment and trial. Defendant was confined in a federal prison during this time, federal officials refused to release him in temporary custody and defendant fought extradition. Also a promise by a state policeman that defendant would not be prosecuted if he provided information was unenforcible because the officer did not have authority to make the promise. State v. Cox (W.Va.) 253 S.E.2d 517.

WITNESSES

The admission of a witness that she was bitter about having to testify so many times, and that it colored her testimony, was not grounds for a reversal or new trial, since there was no indication that the witness testified falsely or in bad faith. State v. Goering (Kan.) 594 P.2d 194.

Where a prosecutor allowed a witness to testify that no plea agreement had been arranged for him and the prosecutor knew that such an agreement was arranged (although it had not been communicated to the witness), the prosecutor's failure to disclose the plea bargain was a denial of due process since the witness's credibility was important to the prosecutor's case. Campbell v. Reid (4th Cir.) 594 F.2d 4.

SEARCH WARRANTS - AMENDMENTS - PRIOR TO EXECUTION

In State v. Workman, 249 S.E.2d 779, S.C. 1978, the Court held that a search warrant can be validly amended prior to execution by sworn oral communication to the issuing magistrate. "S.Car. Code Section 17-13-140 (1976) provides warrants shall issue only upon affidavit 'sworn to before the magistrate.' Because the original warrant was thus procured, the telephone call relating new information under oath, followed by the issuing magistrate's permission to amend the apartment number, substantially complied with the South Carolina statute. The warrant, as amended, described the premises to be searched with sufficient particularity to satisfy constitutional and statutory requirements."

RIGHT TO PRIVACY - REASONABLE EXPECTATION - PRIVATE CLUB

Where officials of a private hunting club enforced their entrance restrictions in a lax manner in that a buzzer system and two-way mirror were not utilized so as to prevent non-uniformed state troopers from gaining entry without proving their membership, they did not have a reasonable and justifiable expectation of privacy so as to invalidate a seizure of gambling paraphernalia observed in plain view upon entry. "Although the buzzer system and one-way mirror militate in favor of an expectation of privacy, the actions of the club negate any such assumption...Indeed, the buzzer system appears to have been a precaution with no substance, since the troopers were admitted on the first occasion without any showing of membership. It would have been a simple matter to position a doorman at the outer door and to check the potential entrant and his identification through the mirror. This lack of enforcement of purported security measures indicated that appellee's expectation of privacy was hardly reasonable or justifiable." (Commonwealth v. Weimer, 396 A.2d 649, Pa.App., 1978).

RIGHT TO PRIVACY - REASONABLE EXPECTATION - STOLEN AUTOMOBILE

Where a defendant allowed a thick brush of "California grass" to grow in his backyard, which effectively prevented the observation into a portion of his backyard where he had marijuana plants growing, this conduct exhibited a reasonable expectation of privacy against observations by persons positioned on his neighbor's property. Therefore, when a police officer climbed a neighbor's fence and used a telescope to observe the marijuana growing in defendant's backyard, this constituted a violation of the defendant's right to privacy.State v. Kender, 588 P.2d 447, Hawaii, 1979.

PROCEDURE - STANDING - EXPIRED RENTAL AGREEMENT

Where the defendant's rental agreement covering an automobile had been terminated and the car was found illegally parked in a loading zone, he had no standing to contest the removal of a briefcase from the trunk. "He had surrendered any reasonable expectation of privacy." People v. Merchant, 272 N.W.2d 656, Mich.App., 1978.

EXCLUSIONARY RULE - APPLICABILITY TO BAIL REVOCATION HEARING

The Supreme Court of Rhode Island has held that evidence is admissible at a bail revocation hearing even if it has been illegally obtained, so long as it is factually reliable. The Court weighed the negligible increase in deterrence of police misconduct if the Exclusionary Rule were applied to bail revocation hearings, against the serious harm that would inevitably result to the bail system if a defendant were permitted to escape the consequences of his violation of conditions of his bail solely because of the Rule. The Court had previously held in State v. Spratt, 386 A.2d 1094 (R.I., 1978) that illegally seized evidence could be used in probation revocation hearings, and the instant Court was of the view that such hearings are analogous to bail revocation hearings, at least in so far as the purposes of the Exclusionary Rule are concerned (Bridges v. Superior Court, 396 A.2d 97, R.I., 1978.

MIRANDA - APPLICABILITY TO POLICE TESTIMONY CONCERNING DEFENDANT'S MANNER OF SPEECH

The failure of police officers to give a defendant Miranda warnings did not bar the admission of their testimony concerning his manner of speech at a police station after his arrest, where the officers were not permitted to testify to the content of the defendant's speech, but merely about his manner of delivery. Thus, such testimony at his trial for public intoxication, second offense, was admissible. State v. Rauhauser, 272 N.W.2d 432, Iowa, 1978.

MIRANDA INTERROGATION - EFFECT OF DEFENDANT'S REQUEST TO SPEAK WITH HIS MOTHER

A defendant's request to speak with his mother during questioning by the police was not equivalent to asking for his attorney for purposes of determining whether the questioning should have ceased upon such a request. State v. Valencia, 589 P.2d 434, Ariz., 1979.

MIRANDA - EFFECT OF VIOLATION OF STANDARD OF PROFESSIONAL RESPONSIBILITY BY PROSECUTOR

Where a defendant made a voluntary statement after knowingly and understandingly waiving his Miranda rights, such statement was admissible at his trial even though an assistant prosecuting attorney had violated a standard of professional responsibility (Code of Professional Responsibility, DR 7-104 (A)(1) by talking to the defendant in the absence of his attorney. Such conduct was not so fundamentally unfair and shocking to the sensibilities of reasonable persons as to rise to the level of a violation of due process of law. People v. Greed, 274 N.W.2d 448, Mich., 1979.

ATTEMPT - ATTEMPTED FELONY ASSAULT

It has been held that like attempted felony murder, there is no such crime as attempted felony assault. People v. Conyers, 411 N.Y.S.2d 303, N.Y.App., 1978.

ARSON - CURTILAGE DOCTRINE - BARN

The Court of Appeals of Indiana, reached the conclusion that a barn which had been converted into a combination garage-work area-recreation room, and which was located 80 to 100 feet from a dwelling, which was insulated and panelled and contained a furnace, telephone, and stereo, and which was used for parties, was within the curtilage of the residence and thus was "part or parcel" of the residence for the purposes of a first-degree arson statute. (IC 35-16-1, 1976 Ed.) Fox v. State, 384 N.E.2d 1159, Ind.App., 1979.

WEAPONS - DEADLY OR DANGEROUS WEAPONS - STAPLER

A stapler was a "deadly or dangerous weapon" within the purview of a statute defining the offense of the commission of a felony while armed, where it was used during the commission of a robbery to bludgeon the victim. Cummings v. State, 384 N.E.2d 605, Ind., 1978).

WEAPONS - DEADLY WEAPONS - UNLOADED REVOLVER

An unloaded revolver which was pointed in such a manner as to communicate to the person threatened the apparent ability to fire a shot and thus to do bodily harm was deemed a "deadly weapon" within the meaning expressed by the legislature in statutes (K.S.A. 21-3408 et seq.) proscribing assault, aggravated assault, and assault on law enforcement officers. State v. Deutscher, 589 P.2d 620, Kan., 1979.

CONTEMPT OF COURT - DIRECT CONTEMPT - SPECTATORS - OFFENSIVE WORDS ON SHIRT

A female spectator at a trial could not be held in direct summary contempt of court for wearing a T-shirt in the courtroom on which were printed the words "Bitch, Bitch" in letters at least five inches high, without being given a reasonable opportunity to alter her behavior. "This is not to imply that the trial court had no right to be offended. We strongly concur that this shirt was not proper courtroom attire. The trial court clearly had the power to exclude the defendant from the courtroom until the offending garment was changed or covered. If, after being put on notice by an order of the court, defendant had remained in the courtroom wearing the offending shirt, she could have properly been held in contempt. Here, however, defendant was not given a reasonable opportunity to alter her behavior. She was held in contempt for appearing in the courtroom with the shirt." People v. Watts, 384 N.E.2d 453, Ill.App., 1978.

RECIDIVISTS - CONSTITUTIONALITY OF STATUTE

The Fifth Circuit Court of Appeals has held that the Texas habitual criminal statute (Vernon's Ann. Tex. P.C. Art. 63) which requires the trial court to sentence a defendant to life imprisonment upon a third conviction for any felony, without consideration of any lesser penalty, does not violate the Eighth Amendment, even as applied to the defendant in the instant case whose offenses were solely property crimes. The Court rules that good time credits could be considered in determining whether a sentence imposed under the Texas habitual criminal statute constituted cruel and unusual punishment. An Appendix to the opinion collects selected examples of the good time provisions of various jurisdictions. Rummel v. Estelle, 587 Fed. 2d 651, 5th Cir., 1978.

RECIDIVIST - EFFECT OF PARDON

A pardon by the Governor of the State on a prior offense does not prevent the use of the pardoned conviction for enhancement purposes in the absence of an allegation that the pardon was granted because of a determination of the defendant's innocence by the Governor. Gaffney v. State, 575 S.W. 2d 537, Tex.App., 1978.

IDENTIFICATION EVIDENCE - LINEUPS - COMPELLING DEFENDANT TO SHAVE HIS BEARD

Neither the Fourth nor Fifth Amendment is violated by an order compelling a defendant to shave his beard for the purpose of a lineup. "There must be a balancing of the State's justification and interest in compelling a defendant or suspect to perform a particular act, as opposed to defendant's constitutional rights, here the right against unlawful intrusions into his body and his right to determine his personal appearance." People v. Delgado, 412 N.Y.S.2d 254, Sup.Ct., Bronx Co., 1978. Co., 1978.

INSANITY - DRUG ADDICTION

The Supreme Judicial Court of Massachusetts has ruled that drug addiction, standing alone, does not qualify as a mental disease or defect which would support a finding of lack of criminal responsibility under the test adopted in that State which is based upon section 4.01 of the American Law Institute's Model Penal Code (Proposed Official Draft 1962), at 66. "We say at this time, however, that drug addiction plays no part in meeting the [insanity] test unless there is a causal connection between the drug addiction and a mental disease or defect of the defendant....In addition, we reject drug addiction alone as an adequate justification for finding that a defendant's consumption of drugs was involuntary and thus his conduct somehow excusable." Commonwealth v. Sheehan, 383 N.E.2d 1115, Mass., 1978.

DISCLOSURE - REBUTTAL WITNESS

The Supreme Court of Alaska has held that if a rebuttal witness is a person known by the prosecution to have knowledge of "relevant facts", his name and address must be disclosed to the defendant, and any statement he may have given must also be disclosed. However, the names of rebuttal witnesses need not be produced if their knowledge is reasonably not thought to be germane to the case until a position taken by defendant during the trial makes it so. In so ruling, the Court overruled anything inconsistent with this new rule in the recent case of McCurry v. State, 538 P.2d 100 (Alaska, 1975). Howe v. State, 589 P.2d 421, Alaska, 1979.

WITNESS - LAY WITNESS - INSANITY

The Court of Special Appeals of Maryland, on the basis of statutory construction (Code 1957, Art. 59, Section 3, et seq.) has held that it is error to admit the opinion of a lay witness on the ultimate question of a defendant's mental illness or insanity, even if the lay witness may have had adequate opportunity to observe the defendant. Under its interpretation of the statute, only physicians and psychologists are permitted to offer opinions of the issue of a defendant's mental illness or insanity. Conn. v. State, 396 A.2d 323, Md.App., 1979.

THE GUILTY PLEA - VOLUNTARINESS - ADEQUATE EXPLANATION OF CHARGES - READING THE INDICTMENT

Merely reading the indictment to the defendant was an insufficient explanation of charges before he pled guilty, in view of the trial court's incorrect statement that the charge was for "engaging in the gun business" when it was actually for conspiring to engage in the business of dealing in firearms without a license in violation of a federal statute and this result was not changed by the mere fact that the defendant received a copy of the indictment and went over it with his attorney. Such did not establish that the charges were adequately explained to him. United States v. Voatright, 588 F.2d 471, 5th Cir., 1979.

PROBATION - CONDITIONS - ABSTENTION FROM ALCOHOLIC BEVERAGES

A condition of probation that the defendant not partake of alcoholic beverages was not unconstitutional on the theory that he was not concomitantly provided with treatment for chronic alcoholism, where there was no showing that the defendant was a chronic alcoholic, namely, that he was an involuntary drinker, that his self-determination and will power were wholly destroyed, and that he was unable to control his use of alcohol. State Ex Rel. Mulligan v. Dept. of Health, Etc. 273 N.W.2d 290, Wis., 1979.

PROBATION - REASONABLENESS - LIE DETECTOR TEST

While a court may constitutionally require a defendant to submit to warrantless searches or to a lie detector test as a condiiton of probation, as long as such conditions are reasonably necessary to make probation effective, in the instant case the Court ruled that in the absence of any factual basis in the record for requiring the defendant to submit to a polygraph tests and to warrantless searches, it was necessary to remand for a hearing to determine whether the conditions of probation were proper. State v. Hovater, 588 P.2d 56, Ore.App., 1978.

PROBATION - REVOCATION - FAILURE TO ADVISE DEFENDANT THAT HIS TESTIMONY WOULD NOT BE ADMISSIBLE AT A SUBSEQUENT CRIMINAL TRIAL

It has been held that a defendant's conviction for probation violation must be reversed and that the matter be remanded for further proceedings, where the trial court failed to advise the probationer before he took the stand at the revocation hearing that his testimony and its fruits would not be admissible against him at a subsequent criminal trial on the underlying charge. People v. Rocha, 272 N.W.2d 699, Mich.App., 1979.

ATTORNEYS - TESTIMONIAL PRIVILEGE - INADEQUATE OR INEFFECTIVE COUNSEL

It has been held that an attorney may be required to answer questions which are intended to establish that he rendered ineffective assistance of counsel, even though the answers to those questions may tend to bring him into public disgrace or contempt. "The materiality of the evidence outweighs the testimonial privilege." Brown v. State, 250 S.E.2d 438, Ga., 1978.

WARRANTLESS SEARCH - PROBABLE CAUSE - SMELL OF MARIJUANA

The aroma of raw marijuana coming from the defendant's automobile truck, and smelled by an agent qualified to detect such odor, was sufficient to provide the agent at a border patrol check point with probable cause to search the trunk. This Court supports the view that an odor sufficiently distinctive to identify a forbidden substance is evidence of the most persuasive character. State v. Sandoval, 590 P.2d 175, N.M.App., 1979.

Drawing by Ed Fisher, 1972
The New Yorker Magazine, Inc

"Where's all that prejudicial pre-trial publicity you promised me?"

PROSECUTING ATTORNEY - WITNESS - RECUSATION

"...We hold that when a deputy prosecuting attorney becomes a witness in a case which is being prosecuted by him or another person in the prosecutor's office, the Code of Professional Responsibility does not require a recusation of the entire staff of the prosecutor. We must point out, however, that a prosecuting attorney exercises authority and speaks through his deputies. If the elected prosecutor himself becomes a witness in a case or otherwise is disqualified by reason of having an interest in the outcome, his entire staff of deputies must be recused in order to maintain the integrity of the process of criminal justice." State Ex Rel. Goldsmith v. Super. Ct. of Hancock Cty., 386 N.E.2d 942, Ind., 1979.

PROSECUTION ARGUMENT - REFERENCE TO RIGHT OF APPEAL

A new trial of both guilt determination and sentencing phases of a murder prosecution was required where the prosecutor stated in argument at the guilt determination phase that "Now you know, if you do err in this case he [defendant] has the right of appeal. The State doesn't have that. The State has no right of appeal from a case like this." The Court stated, "...the overriding vice in this portion of the district attorney's argument is that he effectively told the jurors that they could rely upon the Supreme Court to correct their verdict if it were wrongful or improper thereby causing the jury to believe that the Supreme Court would share with them a burden and responsibility which was in fact their sole responsibility." State v. Jones, 251 S.E.2d 425, N.C. 1979.

SEARCH WARRANTS - PROBABLE CAUSE - NEUTRAL AND DETACHED MAGISTRATE

A search was held to violate the Fourth Amendment where the judge who issued a search warrant accompanied the police on the search, and moved about the premises while the search was being conducted, observing the procedures and the items being seized, conversing with the police officers as well as the defendant, and remaining on the scene for approximately one and one half hours until the search was completed, and the judge then prepared arrest warrants for the defendants. On these facts, including indications that this was not an isolated incident but part of an on-going practice, it could not be found that the magistrate was neutral and detached within the purview of the Fourth Amendment. In fact, the Court was of the view that the judge had "thrown in" with the police and become a part of their law enforcement activity. Thompson v. State, 251 S.E.2d 598, Ga.App., 1978.

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August 9, 1979

To: All County Attorneys

From: Claire Engel, State Law Librarian

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MONTANA HOUSE SESSION LAWS
1979 HOUSE BILL NO. 332

AMENDMENT TO SECTION 46-5-202, M.C.A., 1978

ORAL SEARCH WARRANT

Observations regarding the oral (telephonic) application:

1. Telephonic search warrants should be used only in emergency situations. Emergency existing where there is good faith belief that property to be seized will be destroyed or taken from the jurisdiction before the conventional written application and warrant can be prepared.

Procedure to follow:

1. Officer desiring the search warrant calls a (deputy) County Attorney, relates the probable cause for the issuance of the warrant and the basis for the emergency.

2. The County (deputy) attorney evaluates the officer's opinion, approves or disapproves the request.

3. If the disapproval is because of lack of probable cause, instructions will be given to correct the deficiency. If disapproved because of lack of emergency, the officer will be instructed that the affidavit will be in the normal written Affidavit form with instructions to take necessary precautions to protect the evidence or prevent transfer.

4. If approval of the telephonic warrant, a conference call will be arranged: Magistrate, county (deputy) attorney and officer to assure that they are in communication with each other. Each will be instructed that he is being recorded. Each will be asked to give his name prior to making any statements. Each will be instructed that no erasure will be permitted. The officer will be reminded that he must have a blank search warrant in his possession, as will the county (deputy) attorney who is party to the conference call.

The county (deputy) attorney will then announce the names of the participants, the purpose of the conversation, and the Time, and date, and request that the officer (officers) be sworn in by the judge. The Judge will then administer an oath.

The county (deputy) attorney will then make use of a search warrant check list to develop: names of participants, positions of participants, descriptions with specificity of place to be searched and objects to be seized, elements of probable cause.

Using this check list, the attorney will ask the officer questions guided by the checklist. The judge may also question the officer.

The judge will then announce his approval or disappoval.

If the judge approves, he will complete the original search warrant and sign it. He will then dictate the original warrant to the officer who completes his copy. The judge will authorize the officer to sign the judge's name to the officer's copy and declare this to be a duplicate original.

The attorney monitoring, will announce that the conversation is at an end, and remind the officer to indicate the exact time of service of the warrant.

Purtinent points for consideration: The legislation set forth above specifically provides that the electronic recording will be via the judge on a recording device in the custody of the judge when the application is made. Ideally, there should be a second recording remaining with the county attorney's office noting that a recording must be retained in the court records and transcribed verbatim, including the time and date of recording, as soon as possible thereafter.

Arrangements will have to be made with the phone company to assure that conference calls (county attorney - judge - officer) will be available 24 hours a day.

County attorney's office, judge and officer will each have identical search warrant forms and work sheets to assist in the preparation of the oral request.

The transcribed statement is deemed to be the Affidavit, hence, fail safe assurance that the tape is not erased.

County Attorney and each assistant will have available a warrant checklist which will include, but not be limited to:

1. Jurisdiction (a magistrate may issue a search warrant - j.p. will be limited to the area of jurisdiction,

[redacted], district judges have broad authority and in an emergency could issue a warrant extending beyond the territorial jurisdiction of a particular judicial district).

2. Venue will be State of Montana v. will normally name the defendant, however, where the name of the defendant is not available, the application need not wait for identification.

3. Identity of the issuing judicial officer. (Particularly identify the judge issuing by name, city or county of).

4. Date of the application for a search warrant and specifically the name of the affiant.

5. A description of the offense that has been committed, including code section.

6. Description of the person, premise or thing to be searched: Description must be sufficient to withstand attack and to be readily identifyable by the issuing magistrate so as to leave no doubt as to its location.

7. Description of property to be seized: A particular objective must be set forth to preclude the challenge as an exploratory search and must consist of a particular seizable item: contraband, instruments of the offense, articles of the offense, or articles used in commission of the offense, or evidence of the offense.

8. Justification for the seizure and the facts establishing probable cause: Facts setting forth with particularity why the particular seizable items are expected to be located on the person, premise or thing to be searched: the following sources can be utilized: Personal knowledge of the affiant, personal knowledge of persons other than the affiant who are available to testify, heresay (identifyable informants, other law enforcement officers, businessmen, and persons having knowledge). Here reliability can be established by character and reputation. Example: Closeness to the defendant, custodian of records.

Confidential informants: If a confidential informant is furnishing a basis of the probable cause, then he must be characterized as such and in addition there must be sufficient facts set forth to establish credibility of the informant and the circumstances as to how he acquired the facts to establish probable reliability of the information

furnished as compared to unfounded rumor. Example: Past experience, showing he has predicted future evidence in sufficient detail to prove intimate knowledge, has such a close relationship with the defendant and/or place as to establish reliability, a recitation of precise names, dates, times.

Anonymous informants may not be used to establish probable cause until it is sufficiently corroberated to be so specific and detailed that a magistrate could reasonably decide that probable cause exists. MUST HAVE CORROBERATION.

9. Identification of the Affiant. The Affidavit must be given under oath, and if there is more than one person participating in the oral furnishing of the probable cause statement, each has to be under oath.

10. Direction of the warrant. The warrant will be directed to a specific law enforcement officer or class of offices. Example: Sheriff or any deputy sheriff of Gallatin County, Montana.

11. Certification by the issuing judicial officer. The magistrate must orally certify that the Affidavit was received by him under oath and that he did find probable cause and order the issuance of a search warrant.

Following a review of this checklist and the issuance of a warrant, a return will be prepared and filed as usual and as if the property had been seized on the basis of a warrant issued in person rather than telephonically, with the duplicate original signed by the officer as orally authorized by the magistrate to be returned to the issuing court as if it were obtained under oath in the presence of the magistrate.

Suggested action prior to July 1, 1979: Meet with the various magistrates regarding the emergency application for sworn telephonic applications and receive their input.

Contact the telephone company and set in motion and get the technical ability to have conference phone calls between the necessary parties, minimumly limited to magistrate - County Attorney-- Affiant(s).

Assurance that the magistrate has the recording equipment necessary to preserve the oath and the requirements

of the checklist set forth above with particularity the description of place and things and the statement of probable cause, the magistrate's oral direction to the officer to sign the warrant with his, the officer's and the judge's name.

Having the sound equipment in the County Attorney's office effectively equipped to record the conference phone calls for the oral search warrants as set forth above.

Informants and the Right to Counsel

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

The sixth amendment to the U.S. Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[1] This phrase has been interpreted to mean that a defendant has the right to be represented by a lawyer at various courtroom appearances. It also ensures "the right to communicate and consult freely with [an] attorney prior to, and during, trial."[2] In order to be effective, attorney-client discussions must be confidential. Confidence is imperative or "the client would be reluctant to confide to his lawyer and it would be difficult to obtain fully informed legal advice."[3]

It logically follows that an intrusion into this confidential relationship by a government agent raises serious questions about whether a defendant has been denied his sixth amendment right to present an effective defense. Some courts consider the problem so serious as to warrant dismissal of the charges against the defendant on the theory that the intrusion vitiates the whole proceeding.[4] To officers working cases in which it is possible that informants will be privy to defendants' conversations with their attorneys, the issue has special significance.

This article will attempt to identify those activities of informants or undercover agents which might infringe upon a defendant's right to the assistance of counsel, and offer guidelines on informant conduct in order to minimize the risk of a violation of the sixth amendment.

Weatherford v. Bursey

Although the issue of an informant's intrusion into a defense camp had been raised in a few Supreme Court cases, most notably *Hoffa v. United States*[5] decided in 1966, it wasn't until 1977 in *Weatherford v. Bursey*[6] that the Court squarely addressed the question.

Weatherford was an undercover agent for a South Carolina State investigative agency and was assigned to report on activities at a college campus. In 1970 he and Bursey, another student, participated in the vandalism of a selective service office in Columbia, S.C. Weatherford's participation in this criminal act was permitted to maintain his undercover status. Shortly after the crime, Weatherford advised the authorities of the identities of the participants and he and Bursey were arrested. Weatherford's arrest as a sham defendant enabled him to maintain his guise and report on campus conditions which were deemed by some as explosive.[7] In order to continue the masquerade, Weatherford retained an attorney. Bursey also hired his own counsel.

On two occasions prior to trial, Weatherford attended, by invitation, meetings with Bursey and his lawyer at which defense strategy was discussed. However, at no time did Weatherford inform either his superiors or members of the prosecuting attorney's staff any of the details of these meetings. Until the day of the trial, Weatherford did not expect to be a witness and had, in fact, informed both Bursey and Bursey's attorney that he would attempt to obtain a severance of his case and be tried separately. However, because Weatherford had lost some of his effectiveness as an undercover agent in the weeks preceding Bursey's trial, he was called as a prosecution witness. He testified about his role as an undercover agent and gave an eyewitness account of Bursey's participation in the crime. A conviction resulted.[8]

Three years later, Bursey initiated a civil suit in Federal court against Weatherford and his superior, asserting that Weatherford's presence at the pretrial meetings between Bursey and his attorney violated Bursey's sixth amendment right to the assistance of

counsel. Although the trial court ruled against Bursey, he prevailed on appeal. The Court of Appeals for the Fourth Circuit held that the right to counsel is violated whenever a government agent knowingly intrudes into the attorney-client relationship, regardless of the purpose of the intrusion and irrespective of any showing of substantial prejudice.

On appeal to the U.S. Supreme Court, the court of appeals' ruling was reversed. In an opinion written by Mr. Justice White, the Court noted that if the mere presence of an informant at a meeting between a criminal defendant and his attorney would automatically result in a sixth amendment violation, many legitimate undercover operations would be frustrated. This *per se* rule "would require the informant to refuse to participate in attorney-client meetings, even though invited, and thus for all practical purposes to unmask himself." [9]

The thrust of the Court's holding is that it usually takes something more than an informer's mere presence at an attorney-client conference to violate a defendant's right to the effective assistance of counsel. What that extra ingredient might be depends, in part, on the motive or purpose of the government in allowing the informant to attend the meeting. The Court's opinion draws a clear distinction between cases in which the informer's presence is unintentional and justified, and those in which the intrusion is purposeful and with no apparent justification.

Informant's Presence Justified

When the informant's attendance at the attorney-client meeting is unintentional, no violation exists if there is justification for the informer's presence and the defendant's position is not prejudiced as a result of the meeting. For example, in the *Weatherford* case, the Court noted that Weatherford had not deliberately inserted himself into the attorney-client discussions, but rather had been "invited to the meeting, apparently not for his benefit but for the benefit of Bursey and his lawyer." [10] The government's legitimate need to continue to enjoy Weatherford's services as an undercover agent justified his acceptance of the invitation to attend the meetings. Concern for the safety of an informant has also been cited to justify an informant's presence in a defense camp. In *Klein v. Smith*,[11] a Federal appellate court found no impermissible intrusion into the attorney-client relationship when an informant, who was to testify against the defendant, was secretly represented by the same attorney who represented the defendant. The informant's concern for his safety (he allegedly had been

"... it usually takes something more than an informer's mere presence at an attorney-client conference to violate a defendant's right to the effective assistance of counsel."

threatened by the defendant) justified his activities, just as Weatherford's "desire to protect his 'cover' justified his meetings with Bursey and his counsel. . . ." [12]

But even if the informant's presence is unintended and supported by legitimate justification, a constitutional violation may still be found if the defendant suffers some detriment as a result of the informer's activities. Generally, detriment can be established if one or more of the following three conditions are shown to exist.

1. If the informer testifies about the overheard attorney-client meetings. Note that Weatherford's testimony was restricted to a description of the vandalism of the draft board and "revealed nothing said or done at the meetings between Bursey and . . . [his attorney]. . . ." [13]

2. If the overheard conversations are used by the prosecution to obtain, directly or indirectly, part of the government's evidence. In *Weatherford*, "[n]one of the State's evidence was obtained as a consequence of Weatherford's participation in those meetings." [14]

3. If the government gains an unfair advantage by learning of the accused's defense plans or trial strategy. "Weatherford communicated nothing at all to his superiors or to the prosecution about Bursey's trial plans or about the upcoming trial." [15]

Regarding the last condition, at least one court has interpreted *Weatherford* to mean that prejudice will be *presumed* if the informer transmits information on defense strategy to the government. The case, *United States v. Levy*,[16] involved an informant who was a codefendant of the accused. Prior to trial, the informer disclosed defense strategy to the government. Later, the defendant was convicted. On appeal, the court of appeals reversed. It held that when an informant actually disclosed attorney-client confidences "to the Government enforcement agencies responsible for investigating and prosecuting the case . . ." [17] it is unnecessary to determine whether the disclosure actually prejudiced the defendant. Prejudice will be presumed. The opinion noted that trying to determine if the information conveyed by the informant resulted in detriment to the defendant and benefit to the prosecution would be a virtually impossible task. "[I]t is highly unlikely that a court can . . . arrive at a certain conclusion as to how the Government's knowledge of any part of the defense strategy might benefit the Government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of trial itself." [18]

In sum, when the informer's presence in the defense camp is unintentional and justified by a legitimate government need, if there is "no tainted evidence . . . and . . . no communication of defense strategy to the

prosecution . . . there [is] no violation of the Sixth Amendment." [19]

Informant's Presence Not Justified

It is important to note that the intrusion into the attorney-client relationship in *Weatherford* was unintentional in that the informant had been invited to attend the meeting and it was felt his refusal might jeopardize his status. The Court's opinion clearly distinguished this situation from one in which the government intentionally and without justification inserts an informer into an attorney-client conference. ("Moreover, this is not a situation where the State's purpose was to learn what it could about the defendant's defense plans and the informant was instructed to intrude on the lawyer-client relationship or where the informant has assumed for himself that task and acted accordingly." [20]) If there is a deliberate intrusion into the defense camp, the government will be hard-pressed to convince a court that it had no purpose to intercept information about the defense, or that it learned nothing about the defendant's strategy. If there was no justification for the intrusion, why did the prosecution allow it?

Under these circumstances, it is conceivable that the lower courts will not require a showing of prejudice to the defendant, but instead will find an automatic (*per se*) violation of the sixth amendment. As stated in *United States* v. *Gartner*,[21] a Federal case decided in 1975, a rule requiring an automatic dismissal of the charges (or reversal on appeal) "has been applied in the past to the Government's intrusion upon the attorney-client relationship of a defendant where the conduct has been an offensive interference with the defendant's rights without any justification." [22] Admittedly, the *Gartner* case was decided prior to *Weatherford*; however, its views were expressly adopted by the same court in a case decided after *Weatherford*.[23]

One rationale for the imposition of such a rule in cases of unjustified intrusion was identified by the Supreme Court in a different context:

> *"[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."* [24]

The implication of the cases discussed above is strong. If there is no legitimate justification for the presence of an informer or undercover agent at a meeting of a defendant and his counsel, the courts apparently are prepared to find a violation of the defendant's sixth amendment right to counsel without any showing that the government's conduct prejudiced the defendant's position. And even if the activity in question doesn't rise to the level of a constitutional violation, other grounds may be available to the courts to impose a sanction. For example, Federal judges may exercise their supervisory authority over Federal criminal prosecutions to insure that they are conducted fairly and according to "civilized standards of procedure and evidence." [25] At least one Federal court has indicated that it would not hesitate to set aside a conviction on these grounds in the context of an infringement of the attorney-client relationship.[26] And State court judges may, in interpreting their own State constitutions, impose higher standards on State and local officers than required by the Federal Constitution.[27]

When The Right To Counsel Attaches

A discussion of this topic would not be complete without attempting to determine the stage of the criminal proceedings when the presence of an informer in the defense camp becomes a constitutional issue. The answer depends, at least in part, on identifying that point when the sixth amendment's right to counsel attaches.

The Supreme Court has held that the right to be represented by an attorney exists at the trial of any case which could lead to the loss of liberty.[28] In addition, the right to counsel attaches at important pretrial court appearances, such as arraignment [29] and preliminary hearing,[30] and certain extrajudicial events, such as post-indictment lineups [31] and custodial interrogations.[32] And recently, the Court held that a defendant enjoys the right to counsel for any interview, whether custodial or not, conducted after the initiation of formal adversary proceedings.[33]

But clearly, there is no right to counsel at every stage of the criminal process. While proceedings are still investigatory in nature, the right to counsel does not attach. For example, it has been held that individuals summoned to testify before a State fire marshal have no right to counsel, even though their testimony might provide the basis for criminal charges against them.[34] Similarly, "[a] witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel. . . ."[35] In short, if "[n]o criminal proceedings [have] been instituted . . . the Sixth Amendment right to counsel [does] not come into play." [36] It follows that an intrusion into the attorney-client relationship implicates the sixth amendment only if it occurs after the initiation of prosecution, and then, only if the intrusion pertains to the charge for which prosecution is pending.[37]

But not all intrusions into the attorney-client relationship occur *after* the government has initiated prosecution. Many potential defendants retain counsel upon learning they are under investigation. It is conceivable that an informant, who is a confidant of a criminal suspect, could be privy to attorney-client discussions about *contemplated* charges. Because the right to counsel does not attach until prosecution is actually instituted, it is unlikely courts will characterize intrusions at this stage as sixth amendment violations.[38] It is possible, however, that some other constitutional right might be implicated. It has been suggested that "protection may also be based upon the broad theory that [a] defendant was denied the fair trial to which he is entitled under the due process clause and that counsel in a proper case should claim

both a violation of the right to counsel and a violation of due process."[39] At least one Supreme Court case has language which could support this view.[40] The prudent officer would be wise to consult with his legal adviser or prosecutor prior to the deliberate use of an informant under these circumstances.

Guidelines

It is often very difficult to predict how courts will decide cases in which defendants challenge the constitutionality of police practices. Subtle factual changes frequently affect the result. Nevertheless, adherence to the following suggestions should help avoid problems in the area of informers and lawyer-client conferences.

1. Officers should instruct informants not to attend meetings between defendants and their attorneys. If informants never attend these conferences, obviously there is no problem.

2. If it is felt that an informer must attend, and there is justification for his presence (to preserve his cover, safety concerns, etc.), the informer should be cautioned not to communicate to the officer anything he has learned from the meeting regarding the defense preparations, strategy, or plans concerning the pending charges. (This prohibition should not prevent the informant from relating the substance of discussions about *planned* criminal conduct.[41])

3. If the informer does report on the meeting, officers should avoid relaying the information to the prosecutor. At least one court has indicated that there is no right-to-counsel problem if the information gained by the informer does not reach the prosecuting attorney's office.[42] FBI

Footnotes

[1] U.S. Const. Amend. VI

[2] Annot., 5 A.L.R. 3d 1360, 1364 (1966).

[3] *Fisher v. United States*, 425 U.S. 391, 403 (1976)

[4] *State v. Cory*, 362 P. 2d 1019 (Wash. 1963).

[5] 385 U.S. 293 (1966)

[6] 429 U.S. 545 (1977)

[7] See Brief for the United States as *amicus curiae*, at 4.

[8] After the trial, Bursey disappeared and was not apprehended for 2 years. He then served his 18-month sentence. No direct appeal of his conviction was ever pursued.

[9] 429 U.S. at 547.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 548.

[14] *Id.*

[15] *Id.* at 549.

[16] *Id.*

[17] *Id.* at 550.

[18] *Id.*

[19] *Id.* at 554.

[20] *Id.* at 556.

[21] *Id.*

[22] *Id.* at 558.

[23] *Id.*

[24] *Id.* at 559.

[25] *Id.*

[26] *Id.* at 560.

[27] *Id.*

[28] *Id.* at 561.

[29] *Id.*

[30] *Id.* at 562.

[31] *Id.*

[32] *Id.* at 563.

[33] *Id.*

[34] *Id.* at 564.

[35] *Id.*

[36] *Id.* at 565.

[37] *Id.*

[38] *Id.* at 566.

[39] *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977). Prior to *Weatherford* there was disagreement in the cases on the issue of how far the information learned by the informer must go before the plot endings were (ante-). For example: *United States v. Cooper*, 397 F. Supp. 277 (D. Neb. 1975), indicated that it must reach the prosecutor. However, *United States v. Oman*, 417 F. Supp. 1126 (D. Colo. 1976), held that it was sufficient if the informant merely told the investigators. Accord, *United States v. Crow Dog*, 399 F. Supp. 728 (N.D. Iowa 1975), aff'd 532 F. 2d 1182 (8th Cir. 1976), *cert. denied* 429 U.S. 929 (1977). Although this issue was not addressed directly by the *Weatherford* Court, and language in the opinion can be found which seemingly supports either position, the case appears to favor the latter view. For instance, the Court rejected the argument that Weatherford was a member of the "prosecuting team" and pointed out that "Weatherford communicated nothing at all to his superiors or to the prosecution about Bursey's trial plans or about the upcoming trial." 429 U.S. at 556. (Emphasis added).

[40] 429 U.S. at 557.

[41] 516 F. 2d 633 (2d Cir. 1975), *cert. denied*, 423 U.S. 915 (1975).

[42] *Id.* at 637.

[43] *Allen v. Smith*, 551 F. 2d 189, 191 (7th Cir. 1977), *cert. denied*, 434 U.S. 987 (1977).

[44] *Michigan v. Tucker*, 417 U.S. 433, 447 (1974).

[45] *McNabb v. United States*, 318 U.S. 332, 340-41 (1943).

[46] *See United States v. Vavanis*, 541 F. 2d 618 (6th Cir. 1976).

[47] *See Oregon v. Hass*, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting), and *Cooper v. California*, 386 U.S. 58 (1967).

[48] *Algersinger v. Hamlin*, 407 U.S. 25 (1972). However, if no imprisonment is imposed, there is no right to appointed counsel in misdemeanor cases. *Scott v. Illinois*, 47 U.S.L.W. 4250 (U.S., '79).

[49] *Hamilton v. Alabama*, 368 U.S. 52 (1961)

[50] *Coleman v. Alabama*, 399 U.S. 1 (1970)

[51] *United States v. Wade*, 388 U.S. 218 (1967). In *Kirby v. Illinois*, 406 U.S. 682 (1972), the Court stated that the right to counsel attached after the initiation of "adversary judicial criminal proceedings."

[52] *Miranda v. Arizona*, 384 U.S. 436 (1966)

[53] *Brewer v. Williams*, 430 U.S. 387 (1977). See also *Massiah v. United States*, 377 U.S. 201 (1964)

[54] *Fie (Groben*, 352 U.S. 330 (1957).

[55] *Id.* at 333

[56] *United States v. Mandujano*, 425 U.S. 564, 581 (1976)

[57] *See Hoffa v. United States*, 385 U.S. 293 (1966); *Taylorwill v. United States*, 396 F. 2d 558 (1st Cir. 1968), *aff'd* 394 U.S. 316 (1969).

[58] However, in *United States v. Cooper*, 397 F. Supp. 277 (D. Neb. 1975), a Federal trial court held that a sixth amendment violation would exist if an informant overheard attorney-client conversations "relating to a charge then pending or being investigated." (Emphasis added)

[59] Annot., 5 A.L.R. 3d 1360, 1364 (1966).

[60] In *Black v. United States*, 385 U.S. 26 (1966), the Court reversed a conviction after it was learned that the defendant's conversations with his attorney had been intercepted by the government through the use of an electronic monitoring device. A new trial was ordered to remove any doubt as to Black not having a "fair trial." See also *Caldwell v. United States*, 205 F. 2d 879 (D.C. Cir. 1953) (government agent's intrusion upon conferences between accused and his lawyer affect Constitution's guarantees of effective representation by counsel and the process of law.)

[61] *See United States v. Oliver*, 422 F. Supp. 93, 104 (S.D.N.Y. 1976), *aff'd* 551 F. 2d 1203 (2d Cir. 1976)

[62] See the discussion in footnote 19, *supra*

CRIME UP IN THE UNITED STATES

In 1978, the number of Crime Index offenses reported to U.S. law enforcement agencies increased by 1 percent over those of 1977.

In announcing the Uniform Crime Reports' preliminary statistics, Attorney General Griffin B. Bell stated, "This rise in reported crime during 1978 is even more significant when it is considered that annual figures for 1977 compared with 1976 showed a three-percent decrease. Such a reversal in the crime trend is distressing, especially after the encouraging report of a year ago." FBI Director William H. Webster stressed the necessity for cooperation between the public and law enforcement to counter the upward trend. "Halting this rise in the level of crime should be the concern of all facets of our society," he said.

As a group, the Index's violent crimes showed a 5-percent increase in volume. Aggravated assault rose 7 percent, forcible rape was up 6 percent, robbery increased 3 percent, and murder remained virtually unchanged. Property crimes showed a 1-percent rise collectively. Burglary and motor vehicle theft were each up 1 percent, while larceny-theft showed no change.

In cities with populations over 50,000, the volume of reported Crime Index offenses remained nearly constant. However, rises of 1 percent were recorded in both the suburban and rural areas, and cities outside metropolitan areas reported an increase of 4 percent.

Geographically, the Southern States reported a 4-percent rise and the Western States a 3-percent increase in the total number of Index crimes. The North Central and Northeastern States recorded decreases of 1 and 3 percent, respectively

EXTRADITION OF WANTED PERSONS AND THE NATIONAL CRIME INFORMATION CENTER

JUNE 1, 1979

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JUL 6 1979
MONTANA L.E.T.S.

FBI/DOJ

The National Crime Information Center (NCIC) is a nationwide computerized information system established as a service to the criminal justice community. It is a telecommunications network linking local, state, and Federal criminal justice agencies in the fifty states, the District of Columbia, and the Commonwealth of Puerto Rico to a central computer at FBI Headquarters in Washington, D.C. The FBI, as manager of the NCIC system, helps to maintain the accuracy, timeliness, and completeness of the computerized filing system of documented criminal justice information by applying certain administrative procedures and controls. The records are entered by the agency responsible for the source document; i.e., the warrant, missing persons report or stolen report. The files of NCIC contain records on stolen and felony vehicles; stolen license plates; stolen boats; stolen and recovered guns; stolen articles such as televisions, radios, and office equipment; stolen, embezzled, and counterfeited securities; missing persons; and wanted persons.

The following criteria exists for entry in the Wanted Person File:

1. An individual for whom a Federal warrant is outstanding.

2. An individual for whom a felony or serious misdemeanor warrant is outstanding.

3. Probation and parole violators.

4. A temporary felony warrant when a law enforcement agency needs to take prompt action to apprehend a person who has committed, or the officer has reasonable grounds to believe has committed, a felony.

NCIC policy states that before entering a record of a wanted person in NCIC, the entering agency must attempt to determine, to the maximum extent possible, that extradition will be authorized if the individual is located in another state. For NCIC purposes, extradition is the surrender by one state to another of an individual charged or convicted of an offense outside its own territory and within the territorial jurisdiction of the other. If at the time of entry there is a limitation concerning extradition of the wanted person (e.g., will only extradite if located within 1,000 miles), such information must be placed in the record entry. If at some future time the entering agency learns that the individual definitely will not be extradited, the NCIC record must be canceled. In instances where an agency is absolutely certain that the wanted person will not be

extradited, NCIC policy requires that the individual's record must not be entered in NCIC. A firm commitment by a prosecutor or specific guidelines on when and under what circumstances extradition will be authorized would aid in assuring that the wanted person is not unnecessarily detained as a result of the entry in the NCIC system.

NCIC users are instructed that when an NCIC inquiry on an individual generates a positive response (hit), the inquiring agency must immediately confirm the hit with the agency maintaining the record in the system. Confirming a hit on an NCIC wanted person record means the agency receiving the hit must check with the agency identified as the source of the record to verify that the warrant is still outstanding and the person inquired upon is identical with the subject of the warrant, and to obtain extradition information.

The validity of the above policy is highlighted in the case of Maney v. Ratcliff, United States District Court, Wisconsin, 9/3/75, 39 Fed. Supp. 760 (copy attached). In this case, the court refused to dismiss a civil rights suit brought against a state prosecutor who, with others, allowed an entry naming the plaintiff as a fugitive from justice to

remain in NCIC after a decision was made not to extradite. The court found that while the decision not to extradite was quasi-judicial and thus covered by immunity, the prosecutors' conduct in leaving the entry in the NCIC after a decision had been made not to extradite was not. The decision in this case highlights reasons why NCIC policy is in existence and a need for awareness of and attention to decisions pertaining to extradition. Firm decisions regarding extradition at the time of issuance of a warrant can avoid similar legal action. Likewise, subsequent changes in decisions regarding extradition should be immediately reflected in the NCIC. Such action will minimize exposure to legal liability and avoid detriment to one of the criminal justice community's most effective crime-fighting tools.

In view of the fact that NCIC is utilized on a 24-hour-a-day basis, the law enforcement community and prosecutors must maintain close liaison to ensure that extradition decisions are immediately available when a wanted person is located.

Ronald Lee MANLEY, Plaintiff,
v.
Rudolph E. RATCLIFF et al., Defendants.
Civ. A. No. 75-C-1.

United States District Court,
E. D. Wisconsin.
Sept. 3, 1975.

Plaintiff brought civil rights action against chief of police of Baton Rouge, Louisiana, a police officer, the district attorney for East Baton Rouge Parish and an assistant district attorney. On motions for temporary restraining order and to dismiss, the District Court, Reynolds, Chief Judge, held that venue was

proper in the Eastern District of Wisconsin; that the defendants' actions in placing "fugitive from justice" entry in the FBI National Crime Information Center computer constituted sufficient contacts with Wisconsin to permit exercise of personal jurisdiction over the defendants under the Wisconsin long-arm statute; that plaintiff was not precluded by prosecutorial immunity; that the damages action would be dismissed as to the district attorney because of lack of allegations of his personal involvement; that the claim was not rendered moot because the entry had been removed from the computer data bank; that the doctrine of abstention precluded enjoining of the underlying criminal prosecution; and that a preliminary injunction would issue to require the removal of the "fugitive from justice" entry.

Order in accordance with opinion.

1. Courts ⇐268(4)

"Claim" within statute concerning venue in judicial district "in which the claim arose" means aggregate of operative facts giving rise to right enforceable in courts. 28 U.S.C.A. § 1391(b).

See publication Words and Phrases for other judicial constructions and definitions.

2. Courts ⇐268(4)

Where the operative facts of each of plaintiff's three civil rights claims against chief of police and police officer in Baton Rouge, Louisiana and district attorney and assistant district attorney for East Baton Rouge Parish included arrest and detention in Wisconsin and New York as result of defendants' entry in the National Crime Information Center computer data bank of "fugitive from justice" notice and the subsequent failure of the Baton Rouge authorities to forward extradition papers, plaintiff's claim concerning the two allegedly unlawful arrests in Wisconsin arose in Wisconsin and venue as to the two claims was proper in the Eastern District of Wisconsin. 28 U.S.C.A. § 1391(b); 42 U.S.C.A. § 1983.

3. Courts ⇐268(4)

The traditional rule is that the claim or cause of action arises where the injury occurs, since until there is an injury an essential element of the cause of action is missing.

4. Courts ⇐268(4)

It is the duty of a federal court to apply the long-arm statute of the state in which it sits. Fed.Rules Civ.Proc. rule 4(d)(7), (e), 28 U.S.C.A.; W.S.A. 262.05(4).

5. Courts ⇐12(2)

Under Wisconsin law, in the absence of any statutory provision or legislative history forbidding the long-arm statute's application, and so long as the facts are within the statute's language, the novelty of the factual situation is not a sufficient basis for ruling that the long-arm statute is inapplicable to a situation. W.S.A. 262.05(4).

6. Courts ⇐12(2)

If the defendants' actions fall within the language of the Wisconsin long arm statute, and if they constitute sufficient minimum contacts such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice, personal jurisdiction may be exercised over them by Wisconsin courts. W.S.A. 262.05(4).

7. Courts ⇐268(4)

Actions of Baton Rouge, Louisiana, police chief and police officer and East Baton Rouge Parish district attorney and assistant district attorney in continuously soliciting plaintiff's arrest by means of "fugitive from justice" notice entered into FBI National Crime Information Center computer data bank, in representing to Wisconsin authorities that extradition was desired and that necessary papers would be sent and sending telegram requesting that plaintiff be arrested and that Baton Rouge officer be informed when this was accomplished constituted sufficient minimum contact with Wisconsin to permit,

under long-arm statute, exercise of personal jurisdiction over the Baton Rouge defendants. W.S.A. 262.05(4).

8. Civil Rights ⇐13.8(6)

State prosecutors enjoy an immunity from damages in civil rights suits. 42 U.S.C.A. § 1983.

9. Civil Rights ⇐13.8(6)

While the motive of a prosecutor is irrelevant in determining the scope of his immunity from damages in a civil rights suit, the immunity only extends to conduct which can be described as "quasi-judicial" as opposed to investigatory activities normally performed by laymen, such as police officers. 42 U.S.C.A. § 1983.

10. Civil Rights ⇐13.8(6)

Although the decision of whether to extradite is within the "quasi-judicial" function of a state prosecutor, conduct of Louisiana district attorney's office in leaving outstanding arrest warrant entry on the FBI National Crime Information Center computer system after having decided not to extradite plaintiff was not within the prosecutorial function and was outside the scope of prosecutorial immunity in a civil rights suit. 42 U.S.C.A. § 1983.

11. Federal Civil Procedure ⇐1750

Where complaint in civil rights action contained no allegations of personal involvement by state prosecutor and his name appeared only in the caption of the complaint, civil rights suit would be dismissed against him insofar as it sought damages from him. 42 U.S.C.A. § 1983.

12. Civil Rights ⇐13.2(4)

Where Louisiana officials had not indicated that the fugitive entry would not be placed back on the FBI National Crime Information Center computer at some future time, fact that the entry had been removed from the computer data bank did not render the plaintiff's request for preliminary injunction to remove the entry moot in civil rights action. 42 U.S.C.A. § 1983.

13. Courts ⇐508(7)

Federal intervention in a pending state prosecution is possible only when there is a showing of bad faith or harassment by the state prosecuting officials, when the state law to be applied in the criminal proceeding is flagrantly and patently unconstitutional or when there exist similar extraordinary circumstances.

14. Courts ⇐508(7)

Within the rule permitting federal intervention in a state prosecution when there is a showing of "bad faith" or "harassment" by the state prosecuting officials, the terms "bad faith" and "harassment" connote intentional, purposeful conduct motivated by a malicious or discriminatory purpose.

See publication Words and Phrases for other judicial constructions and definitions.

15. Courts ⇐508(7)

Where there was no showing in civil rights action that Louisiana prosecutors possessed any personal animosity toward plaintiff and there was no showing that the plaintiff had been singled out from other Louisiana "fugitives from justice" for the purpose of harassment, although plaintiff's verified complaint evinced a reckless and callous disregard by Louisiana officials for plaintiff's constitutional rights by placing "fugitive from justice" entry on the FBI National Crime Information Center computer, there was not a sufficient showing of intentional bad faith or harassment which would permit the issuance of an injunction restraining the pending criminal prosecution. 42 U.S.C.A. § 1983.

16. Courts ⇐508(7)

The doctrine of abstention does not bar federal courts from enjoining unlawful police conduct where no significant disruption of a pending criminal prosecution would result.

17. Courts ⇐508(7)

Where an order requiring Louisiana officials to take the "fugitive from justice" entry off the FBI National Crime

Information Center computer and to keep it off would not interfere with underlying criminal prosecution and plaintiff had no assurance that the Louisiana officials would ever attempt to formally extradite him and would not simply continue the fugitive entry, resulting in an arrest and detention every time plaintiff came in contact with a police agency, plaintiff was entitled to preliminary injunction in civil rights action enjoining the Louisiana officials from continuing the "fugitive from justice" entry. 42 U.S.C.A. § 1983.

18. Injunction ⇐136(1)

Issuance of preliminary injunction is proper only where there is a showing that plaintiff has no adequate remedy at law and will be irreparably harmed if injunction does not issue, that balance of hardships tilts towards plaintiff and that plaintiff has at least a reasonable likelihood of success on the merits.

19. Searches and Seizures ⇐7(1)

A core concept of the Fourth Amendment is the right to be free from arbitrary and unreasonable interference by police. U.S.C.A.Const. Amend. 4.

20. Searches and Seizures ⇐7(1)

Repeated arrests without subsequent prosecution is a violation of the Fourth Amendment. U.S.C.A.Const. Amend. 4.

21. Civil Rights ⇐13.7

Fact that Louisiana officials did not personally make the arrests of plaintiff in Wisconsin and New York did not extinguish their accountability because of the "fugitive from justice" entry on the National Crime Information Center computer system, since the Civil Rights Act imposes liability on anyone who causes a deprivation of constitutional rights such as repeated arrests without subsequent prosecution. U.S.C.A.Const. Amend. 4; 42 U.S.C.A. § 1983.

22. Searches and Seizures ⇐7(1)

Where Louisiana officials, by placing "fugitive from justice" entry on National Crime Information Center computer, caused plaintiff to be arrested and jailed on three occasions and did not proceed to extradite him to Louisiana by the proper lawful procedure, Louisiana officials violated plaintiff's Fourth Amendment rights. U.S.C.A.Const. Amend. 4.

23. Injunction ⇐74

When there is a threat of future violations of Fourth Amendment rights, the courts do not hesitate to conclude that there is no adequate legal remedy and that an injunction must issue to prevent irreparable injury. U.S.C.A. Const. Amend. 4.

24. Injunction ⇐136(3)

Although damages may be recovered for unconstitutional police and prosecutorial conduct, that remedy does not fully compensate a plaintiff nor deter future misconduct and a preliminary injunction may issue upon a showing of probability of future violations of Fourth Amendment rights. U.S.C.A.Const. Amend. 4.

25. Civil Rights ⇐13.2(4)

Where entry of preliminary injunction requiring Louisiana officials to remove "fugitive from justice" entry from National Crime Information Center computer would not foreclose the officials from prosecuting plaintiff since they could attempt to extradite him by means of Wisconsin law but the plaintiff would suffer irreparable injury by future arrests based on the entry, the balance of hardships tilted towards plaintiff and preliminary injunction would issue in civil rights action. U.S.C.A.Const. Amend. 4; 42 U.S.C.A. § 1983. W.S.A. 976.03.

David A. Melnick, Milwaukee, Wis., for plaintiff.

Reuben W. Peterson, Jr., Milwaukee, Wis., for defendants Ratcliff and Welborn.

David M. Miller, Baton Rouge, La., for defendants Brown and Chaffin

DECISION AND ORDER

REYNOLDS, Chief Judge.

This is an action challenging the defendants' use of the Federal Bureau of Investigation's National Crime Information Center (NCIC)[1] to locate and detain plaintiff so that he could be extradicted to Louisiana. The complaint is based on 42 U.S.C. § 1983, and subject matter jurisdiction is present under 28 U.S.C. § 1343. Various types of injunctive relief are requested, as well as both compensatory and punitive damages. Plaintiff Ronald Lee Maney has filed a motion for a temporary restraining order. All the defendants have moved to dismiss for improper venue, Rule 12(b)(3), Federal Rules of Civil Procedure, and for lack of personal jurisdiction, Rule 12(b)(2). Defendants Brown and Chaffin have further asserted that the complaint fails to state a claim as to them, Rule 12(b)(6).

I.

The verified complaint states that plaintiff Ronald Lee Maney is a resident of the City of West Allis, Wisconsin, which is located within the Eastern District of Wisconsin. Defendants Rudolph E. Ratcliff and John Welborn are identified, respectively, as the Chief of Police of Baton Rouge, Louisiana, and a police officer for the Baton Rouge Police Department. Defendant Ossie Brown is the District Attorney for East Baton Parish, and defendant Richard Chaffin is identified as an Assistant District Attorney. It is alleged that all defendants, at least in their official capacities, reside in Baton Rouge, Louisiana. Portions of paragraphs IV, V, and VI of the complaint provide:

> IV—"In April, 1974, the plaintiff * * * was arrested by City of Milwaukee Police for a minor traffic violation. Standard procedure requires a check of the NCIC system to see if the person who is under arrest is wanted by any other jurisdictions * * *. As a result of the NCIC check, it was found that Ronald Lee Maney was wanted by the authorities in Baton Rouge, Louisiana, for a felony narcotics charge. * * * Maney, was allowed to contact and retain * * * David A. Melnick * * * who appeared in Assistant District Attorney William Gardner's office the following day after the arrest. * * * Gardner indicated the procedure he would follow since Ronald Lee Maney would not waive extradition, that procedure being since the charges were rather vague he, * * * Gardner, would write to the authorities in Baton Rouge, Louisiana, requesting that they immediately forward the paper work so that the process of extradiction could begin. At that time * * * Gardner set the matter down for two weeks to again appear in his office. Two weeks later, * * * Maney and his attorney * * * appeared in * * * Gardner's office at which time Mr. Gardner indicated the paper work had still not arrived and put the matter over for another two weeks indicating that if by that date nothing had come from Baton Rouge, Louisiana, he would release Ronald Lee Maney and decline prosecution. Two more weeks passed and Mr. Gardner

1. The F.B.I.'s National Crime Information Center commenced operations in January 1967. It provides a computer-based information storage and retrieval system for the over 6000 participating agencies that submit data. Some typical categories of information are used, including outstanding warrants stolen vehicles, boats, guns, and firearms. Through the use of computer-to-computer interface, almost immediate access to information stored in the NCIC is available. The F.B.I. discharge participants for using the system, and the information gathered and stored is considered the property of the agencies which submit it. As of November 1971, thirty states had on-line access to NCIC, and the major cities in the remaining states were also participants. *See, United States v. Mackey*, 387 F.Supp. 1121 (D.Nev.1975). NCIC A Tribute to Cooperative Spirit, F.B.I. Law Enforcement Bulletin, Feb. 1972, at 2.

[sic] released Ronald Lee Maney from prosecution."

V—"In October, 1974, Ronald Lee Maney, was arrested by West Allis Police, in a matter dealing with registration of an automobile. Once again, the * * * police discovered by NCIC entry with regard to Ronald Lee Maney, indicating that he was a fugitive from justice. The * * * police allowed Ronald Lee Maney to make a telephone call whereupon he called his attorney * * * who discussed the matter with the police on the telephone and further discussed this matter with Lieutenant Schwigle * * * Lieutenant Schwigle indicated to Attorney Melnick that he had called down to Baton Rouge, Louisiana, after hearing what happened to Mr. Maney the first time with the Milwaukee Police Department. Lieutenant Schwigle indicated he talked with a policeman named McMillan who indicated that Sgt. John Welborn, of the Baton Rouge, Louisiana Police Department, was in charge of the case and would call Lieutenant Schwigle back. At approximately 9:00 o'clock P.M., October 22, 1974, Sgt. Welborn called Lieutenant Schwigle and indicated that Assistant District Attorney Richard Chaffin, of the Baton Rouge, Louisiana District Attorney's Office, was the prosecutor and had told Sgt. Welborn that they did not have enough evidence to extradite in April, 1974, but did discover evidence since April, 1974, and therefore they would extradite at this time. Whereupon Ronald Lee Maney was once again brought before Assistant District Attorney William Gardner who after reviewing all events in the matter called down to the District Attorney's office in Baton Rouge, Louisiana, in the presence of Mr. Maney, Mr. Melnick and two police officers from the West Allis, Wisconsin, police department. The Baton Rouge, Louisiana District Attorney's office had stated at that time that they did want Mr. Maney and that they would forward the paper work necessary to proceed on the extradition. Based upon that representation, Mr. Gardner did issue the necessary process and Mr. Maney was brought before the County Court of Milwaukee County, Wisconsin, whereupon the matter was adjourned thirty days pursuant to Statute, awaiting the necessary information and paper work from the authorities in Baton Rouge, Louisiana. Thirty days later Ronald Lee Maney and his attorney, David A. Melnick, appeared before the Honorable Carl E. Bjork, who after hearing that once again Baton Rouge, Louisiana, authorities failed to forward any materials whatsoever, with regard to the case against Ronald Lee Maney, dismissed the case immediately and released Mr. Maney from custody."

VI—"On December 31, 1974, Attorney David A. Melnick, received a telephone call from Mr. Maney indicating that he had been once again arrested on the basis of the NCIC entry that he was a fugitive from justice, this time in Plattsburgh, New York, which is the jurisdiction located nearest to the United States-Canadian border. According to the Plattsburgh Police, Mr. Maney had been arrested after his name was checked on the computer at the port of entry and is showed that he was wanted by the Baton Rouge, Louisiana, police department and was a fugitive from justice. Mr. Maney is being once again held in the Plattsburgh jail, awaiting the thirty day period to have the Baton Rouge, Louisiana, police forward the necessary papers for extradiction. Ronald Lee Maney has informed his attorney that he does not have any money to post bail and if he remains in jail away from work he will lose his job."

Following the filing of this action, plaintiff's attorney telephoned Ann Assumpmain, the District Attorney for Clinton County, New York. Assumpmain indicated that he had been holding plaintiff in the Plattsburgh jail as a fugitive from justice based on the Louisiana NCIC entry, but that defendant

Chaffin had been telephoned and had indicated that extradition papers would not be forwarded. In light of this, Assapourian did not file formal charges against plaintiff and released him on January 2, 1975.

A hearing was held on plaintiff's motion for a temporary restraining order on February 18, 1975. At the hearing, defendants Brown and Chaffin filed documents which had been submitted to the Governor of Louisiana, asking that he request the extradition of plaintiff from Wisconsin. Those documents included a copy of an arrest warrant and affidavit dated May 16, 1973, in which it was charged that Ronald Manry had feoniously distributed one ounce of marijuana on February 11, 1973, in violation of L.R.S. 40:966(A).

II.

Since there is no special venue statute for civil rights actions, 28 U.S.C. § 1391 (b) controls and reads as follows:

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

As none of the defendants reside in this district, venue is proper only if plaintiff's claim can be said to have arisen in the Eastern District of Wisconsin. *Jones v. Bah*, 58 F.R.D. 454 (N.D.Ga. 1972).

The complaint details that on three occasions[2] — in April, October, and December of 1974 — plaintiff was arrested and detained by the police officers on the strength of the NCIC entry originating from Baton Rouge authorities. With respect to each occasion, it is further alleged that the defendants failed to forward any of the papers necessary for extradition of plaintiff. Each of the three instances constitutes a separable claim of a violation of plaintiff's right to be free from unreasonable police and prosecutorial conduct. It is reasonable, therefore, to consider where each of the three claims can be said to have arisen in order to determine whether venue is proper in this judicial district for any of them.

[1, 2] As used in 28 U.S.C. § 1391(b), "claim" means "the aggregate of operative facts giving rise to a right enforceable in the courts * * *." *Ryan v. Glenn*, 52 F.R.D. 185, 192 (N.D.Miss. 1971). See, *Original Ballet Russe v. Ballet Theatre*, 133 F.2d 187 (2d Cir. 1943), 1 Moore's Federal Practice, ¶ 0.142[5.-2], at 1423-1435 (2d ed. 1974). The operative facts of each of plaintiff's three claims include the presence of the Baton Rouge NCIC entry, an arrest and detention based on the entry, and the subsequent failure of the Baton Rouge authorities to forward extradition papers. While the defendants' alleged acts and omissions occurred in Louisiana, the arrests and detentions occurred in Wisconsin and New York. These injuries are part of the claims plaintiff seeks to litigate.

[3] Section 1983 actions which contain allegations of constitutional deprivations caused by unlawful arrests and seizures are analogous to tort actions for false arrest and imprisonment. See, *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Since § 1983 should be read against a background of tort law liability, *Pierson v. Ray*, 386 U.S. 547, 556-557, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967), *Monroe v. Pape*, supra, 365 U.S. at 187, 81 S.Ct. 473, law governing where tort law claims arise is highly relevant for determining where claims under § 1983 should be ruled to have

2 None of the parties have formally informed the court whether the Governor of Louisiana requested extradition, nor has the court received written notice of what action the Governor of Wisconsin may have taken, if any.

An attorney for defendants Brown and Chaffin stated at the hearing that the fugitive from justice entry concerning plaintiff had been, at least temporarily, taken off the NCIC. No written representation of this has been filed, and the defendants did not offer any assurance that the entry would not be placed on the NCIC once again.

arisen. The traditional rule is that the claim or cause of action arises where the injury occurs, since until there is an injury an essential element of the cause of action is missing. *See, Miller v. Cousins Properties, Inc.*, 346 F.Supp. 711 (D.Vt. 1974); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 291 F.Supp. 262, 266 (E.D.Pa.1968); *Poon v. Savant Instruments, Inc.*, 264 F.Supp. 232 (E.D.N.Y. 1967). Under the traditional tort law rule, therefore, plaintiffs first two claims arising out of events in April and October arose in Wisconsin, while the third claim arose in New York.

Venue for the first two claims is properly laid in this district, since many of the operative facts giving rise to the claims occurred here. *Jimenez v. Pierre*, 315 F.Supp. 365 (S.D.N.Y.1970). The third claim, relating to events in New York in late December and early January, did not arise in this district and venue is therefore improper. Although transfer of that claim to an appropriate district in New York or Louisiana under 28 U.S.C. § 1404 would be permissible, at the hearing plaintiff indicated that he wished the third claim dismissed. Defendants' motion to dismiss for improper venue must, therefore, be denied as to the first two claims and granted as to the third claim.

III.

All the defendants have filed motions to dismiss for lack of personal jurisdiction. Plaintiff has responded with the assertion that Wisconsin's long-arm statute is sufficient to form the personal jurisdiction. Consideration of the motions requires, first, a determination of whether the long-arm statute can be applicable in an action of this nature, and secondly, whether the conduct of the defendants is sufficient to bring them within the long-arm statute.

A. *Applicability of Wisconsin's Long-Arm Statute*

[4] Under Rule 4(d)(7), and Rule 4(e), Federal Rules of Civil Procedure, state long-arm statutes are incorporated into the federal rules, thereby making it the duty of a federal court to apply the long-arm statute of the state in which it sits. *Kirchen v. Orth*, 390 F.Supp. 313 (E.D.Wis.1975). Plaintiff has contended that § 262.05(4), Wis.Stats. (1973) (local injury; foreign act), is applicable.

Defendants' position that the long-arm statute is inapplicable is based on their contentions that the statute was not intended to apply to the use of the NCIC system by police and prosecutors, and that the "contacts" with Wisconsin were initiated for the purpose of enforcing Louisiana's criminal laws rather than for the defendants' economic self-benefit.

[5, 6] This position must be rejected. Although the Wisconsin legislature may not have contemplated the application of the long-arm statute to the facts alleged in this action, in the absence of any statutory provision or legislative history forbidding the statute's application, and so long as the facts are within the statute's language, the novelty of the factual situation is not a sufficient basis for ruling that the long-arm statute is inapplicable. Moreover, nothing in the long-arm statute makes the motive for a defendant's activities determinative of the statute's application. If the defendants' actions fall within the language of the long-arm statute, and if they constitute sufficient "minimum contacts * * * such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'" *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), then personal jurisdiction may be exercised over them.

B. *Jurisdiction Over Defendants*

Section 262.05(4), Wis.Stats. (1973), provides:

"A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an

action pursuant to s. 262.06 under any of the following circumstances:

* * * * * *

"(4) Local injury; foreign act. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury either:

"(a) Solicitation or service activities were carried on within this state by or on behalf of the defendant, or

"(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade."

Since the Wisconsin court has not authoritatively construed § 262.05(4), the revision notes of G. W. Foster, Jr., contained in the pocket part of 30 W.S.A., are relevant here. *McCallia v. A. J. Industries, Inc.*, 352 F.Supp. 944 (E.D. Wis.1973); *McPhee v. Simonds Saw and Steel Co.*, 294 F.Supp. 775 (W.D.Wis. 1969); *Pavalon v. Fishman*, 36 Wis.2d 228, 149 N.W.2d 263 (1966); *Flambeau Plastics Corp. v. King Bee Mfg. Co.*, 24 Wis.2d 159, 129 N.W.2d 227 (1964). At page 42 of the notes, Foster states that under § 262.05(4)—

"Three jurisdictional facts are required by this subsection: (i) an act or omission outside the state by the defendant or his agent; (ii) an injury to person or property within the state which is claimed to arise out of the foreign act or omission; and (iii) some additional contact, not necessarily related to the injury sued on, which links the defendant to the state."

Of the three requisites set forth by Foster, the second, an injury to person is present here. The verified allegations that plaintiff was twice arrested and held on the strength of the Eaton Rouge NCIC entry are sufficient to establish the "local injury."

[7] The first requisite—"an act or omission outside the state by the defendant or his agent"—is also present. While District Attorney Brown and Chief of Police Ratcliff have argued that the complaint alleges no conduct by them, under Wisconsin law personal jurisdiction can be acquired over a principal for the acts of his agents. See, § 262.06(3), Wis. Stats. (1973);[3] *Pavalon v. Fishman*, supra. There has been no contention that the NCIC request was not initially entered by agents of defendant Ratcliff, nor that defendant Brown and his agents were not responsible for taking the request off. In light of this, defendants Ratcliff and Brown may properly be held responsible for the acts and omissions of their agents and employees.

The third requirement—"some additional contact, not necessarily related to the injury sued on, which links the defendant to the state"—is intended to embody the statute's requirement of "[s]olicitation or service activities * * carried on within this state by or on behalf of the defendant. § 262.05(4)(a), Wis.Stats. (1973). The following facts are sufficient to satisfy this requirement: (1) the continuous solicitation of plaintiff's arrest by means of the NCIC; (2) Welborn's October 22 telephone call to Lieutenant Schwigle of the West Allis police; (3) the representation made by the District Attorney's office to Assistant District Attorney William Gardner that extradition was desired and that the necessary papers would be sent; and (4) a telegram sent by Welborn to the West Allis police on October 22 requesting that plaintiff be arrested and Welborn notified when this was accomplished.

In *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283

3 "'Defendant' means the person named as a defendant in a civil action, and where in this chapter acts of the defendant are referred to the reference attributes to the defendant any personal acts for which acts the defendant is legally responsible. In determining for jurisdiction purposes the defendant's legal responsibility for the acts of another the substantive liability of the defendant to the plaintiff is irrelevant."

(1958), the Court emphasized that the exercise of personal jurisdiction over nonresident defendants was limited by the principle that " * * * it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The conduct of the agents of defendants Ratcliff and Brown was a sufficient invocation of Wisconsin law to make exercise of personal jurisdiction over them permissible.

Personal jurisdiction also exists over defendants Chaffin and Welhorn under the long-arm statute. The verified complaint, together with the affidavits of Chaffin and Schwigle, make it evident that Chaffin was the Assistant District Attorney in charge of narcotics cases. Further, Chaffin's message that the District Attorney's office desired to have plaintiff extradicted resulted in plaintiff being held by the West Allis police and ultimately presented as a fugitive from justice under § 976.03(13), Wis.Stats. (1973).[4] Defendant Welhorn not only telephoned Schwigle and relayed Chaffin's message, but also sent the telegram which was attached to the criminal complaint by which plaintiff was charged.

The requirements of § 262.05(4) are satisfied in this action, and denial of defendants' motions to dismiss will not infringe their rights to due process. *Hanson v. Denckla*, supra.

4. "(13) Arrest prior to requisition. Whenever any person within this state shall be charged on the oath or any credible person before any judge of this state with the commission of any crime in any other state and, except in cases arising under sub. (6), with having fled from justice, or with having been convicted of such crime in that state and having escaped from confinement or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime and, except in cases arising under sub. (6), has fled from justice, or with having been convicted of such crime and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this state, the judge shall issue a warrant directed to any police officer or commanding him to apprehend the person named therein, wherever he may be found in this state and to bring him before the same or any other judge or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant."

IV.

Defendants Brown and Chaffin have moved to dismiss the complaint for failure to state a claim, Rule 12(b)(6), F.R.Civ.P., both of them asserting prosecutorial immunity and defendant Brown contending that the complaint fails to allege any conduct by him.

Immunity from damages in an action under § 1983 has been established by the Supreme Court with respect to legislators, *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); judges, *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); state executive officers, *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); and school board members, *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). The considerations giving rise to these immunity doctrines are that a public official who exercises discretion should not have to fear personal monetary liability for his errors, and that fear of having to defend damage actions and of being held liable in damages would deter qualified persons from seeking and accepting public office.

[8, 9] Although the Supreme Court has not as yet dealt with the question of prosecutorial immunity in § 1983 actions, the rule in this circuit is that prosecutors do enjoy an immunity from damages. *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917, 94 S.Ct. 1413, 39

L.Ed.2d 471 (1974). While the motive of a prosecutor is irrelevant in determining the scope of his immunity, *Hampton v. City of Chicago*, supra, at 608, the immunity only extends to conduct which can be "described as 'quasi-judicial' as opposed to investigatory activities normally performed by laymen, such as police officers." *Hampton v. City of Chicago*, supra, at 608. Thus, in *Hampton*, the Court held that planning and executing a raid was not conduct with the prosecutor's "quasi-judicial" role, and that the defendant prosecutors had no immunity from damages. By contrast, in *Tyler v. Witkowski*, 511 F.2d 449 (7th Cir. 1975), the prosecutors' conduct of deciding whether to drop a charge because of insufficient evidence was held to be conduct within the "quasi-judicial" prosecutorial function. Similarly, *Bogd v. Adams*, 514 F.2d 83 (7th Cir. 1975), held that dismissing a criminal charge in return for a release of liability was conduct covered by the defendants' prosecutorial immunity. *Bogd* further held that prosecutors enjoy no immunity whatsoever from injunctive relief.

[10] Defendant Chaffin has contended that the decision whether to extradite is within the traditional prosecutorial function, since it is based on a discretionary balancing of considerations such as the expense involved, the severity of the crime, availability of witnesses, the merits of the case, and the like. While the decision of whether to extradite is within the "quasi-judicial" function of a prosecutor, the complaint here can fairly be read to argue that this decision was made in April 1974 after Assistant District Attorney William Garbow wrote the Baton Rouge authorities and requested that they forward the paperwork. After deciding not to extradite, the NCIC entry was nevertheless left on the system, resulting in the arrest of plaintiff in October. The conduct of leaving the entry on the NCIC system after having decided not to extradite plaintiff is not within the prosecutorial function and is outside the scope of prosecutorial immunity. *Hampton v. City of Chicago*, supra. At this stage of the action, all of the conduct which may be attributed to defendant Chaffin cannot be held to be cloaked by the immunity doctrine, and his claim of prosecutorial immunity must be rejected.

[11] In *Adams v. Pate*, 445 F.2d 105, 107 n. 2 (7th Cir. 1971), the Court stated:

> "Where monetary damages, as distinguished from equitable relief, is sought under the provisions of the Civil Rights Act the doctrine of respondeat superior does not apply; *personal involvement* of the defendant is required. [Citation omitted.]" (Emphasis added.)

See, *Wood v. Breier*, 66 F.R.D. 8, 10-11 (E.D.Wis.1975). The complaint herein contains no allegations of personal involvement by defendant Brown. Indeed, his name appears only in the caption of the complaint. *Adams*, therefore, requires a dismissal of the complaint against defendant Brown insofar as it seeks damages from him.[5]

V.

Plaintiff's motion seeks to have the Court order that during the pendency of this action, the defendants, together with their agents, servants, employees, and employees, are (1) restrained from prosecuting any action which led to the NCIC entry concerning plaintiff, and (2) are

5 The complaint also fails to allege any personal involvement of defendant Ratcliff. Further, Ratcliff has submitted an affidavit in which it is stated that he resigned as Chief of Police on August 8, 1974. Since Ratcliff is no longer a party to this action, and since pursuant to Rule 12(b)(6) or for summary judgment under Rule 56, plaintiff has not been required to respond to the questions of whether the damage claim against Ratcliff is supportable and whether Ratcliff should remain a party for the purpose of injunctive relief. It would, therefore, be inappropriate for the Court to deal with these questions *sua sponte*. *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278 (9th Cir. 1974).

required to take the fugitive from justice entry of the NCIC. The motion, denominated as "Motion for Temporary Restraining Order," was filed on January 3, 1975. On January 14, 1975, the Court mailed a notice which scheduled a hearing on the motion for February 18, 1975, and required any opposing party to file an answering brief by February 5, 1975. The defendants thereafter filed the motions to dismiss discussed above, but did not file any briefs specifically addressing the issue of whether plaintiff's motion should be granted. Moreover, after the hearing, no defendant filed any briefs opposing plaintiff's motion. However, the statements of the defendants' attorneys made at the February 18 hearing indicated that the defendants had not consented to plaintiff's motion being granted.

Although the motion is captioned "Motion for Temporary Restraining Order," the requested order would be of indefinite and potentially unlimited duration. Since defendants have had a full opportunity to be heard and to submit briefs and affidavits in opposition, no harm will befall them by treating plaintiff's motion as one for a preliminary injunction. *Sampson v. Murray*, 415 U.S. 61, 84-88, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974).

A. *Mootness*

An initial problem that must be dealt with is whether the request for an order taking the NCIC entry off has become moot. As stated above (see page 766, footnote 2), at the February 18 hearing, one of defendants' attorneys orally indicated that the fugitive from justice entry concerning plaintiff had been taken off the NCIC. Defendants have not filed anything with the court in confirmation of this. Further, no representation was made at the hearing, or subsequent to it, that the entry would not be placed back on the NCIC at some future point in time.

[12] In these circumstances, it is evident that the request for an order requiring the defendants to take the fugitive from justice entry off is not moot. "* * * [V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i. e., [it] does not make the case moot. * * *" The defendant is free to return to his old ways. * * *" (Citations omitted.) *United States v. W. T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). *See, Allee v. Medrano*, 416 U.S. 802, 810-811, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974); *N.L.R.B. v. Raytheon*, 398 U.S. 25, 90 S.Ct. 1547, 26 L.Ed.2d 21 (1970); *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 202-204, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968); *Gray v. Sanders*, 372 U.S. 368, 375-376, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43, 65 S.Ct. 11, 89 L.Ed. 29 (1944); Hart and Wechsler's, *The Federal Courts and The Federal System*, at 110 (2d ed. 1973). Further, "Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. * * * The purpose of an injunction is to prevent future violations * * *." (Citations omitted.) *United States v. W. T. Grant Co.*, supra, 345 U.S. at 633, 73 S.Ct. at 897. There does exist here "some cognizable danger of recurrent violation" of plaintiff's rights, *United States v. W. T. Grant Co.*, supra, at 633, 73 S.Ct. at 898.

B. *Abstention*

[13] Plaintiff's request for an order restraining a pending criminal prosecution requires discussion of the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971),[6] and its progeny: *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); *Byrne v. Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 782 (1971); *Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); *Byrne v. Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 782 (1971).

6 Compare cases to *Younger* were *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); *Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); *Perez v. Ledesma*, 401 U.S. 82,

Mirando, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975); *Kugler v. Helfant*, 421 U.S. 117, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975); *Schlesinger v. Councilman*, 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); *Allee v. Medrano*, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974). See also, *Ellis v. Dixon*, 421 U.S. 126, 95 S.Ct. 16, 1 L.Ed.2d 274 (1975); *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972). The basic principle of this doctrine is that

> "* * * in the absence of exceptional circumstances creating a threat of irreparable injury 'both great and immediate,' a federal court must not intervene by way of either injunction or declaratory judgment in a pending state criminal prosecution." *Kugler v. Helfant*, supra, 421 U.S. at 123, 95 S.Ct. at 1530.

Federal intervention is possible only where there is a showing of bad faith or harassment by the state prosecuting officials, where the state law to be applied in the criminal proceedings is flagrantly and patently unconstitutional, or where there exist similar extraordinary circumstances. *Kugler v. Helfant*, supra, at 123, 95 S.Ct. at 1524.

[14, 15] Plaintiff has argued that the defendants' actions of requesting and securing plaintiff's arrest on three occasions without pursuing extradition and the continuance of the NCIC entry throughout this period constitutes a sufficient showing of bad faith and harassment so as to warrant enjoining the underlying prosecution. This Court must disagree. The terms "bad faith" and "harassment" connote intentional, purposeful conduct motivated by a malicious or discriminatory purpose. *Duncan v. Perez*, 445 F.2d 557 (5th Cir.), cert. denied, 404 U.S. 940, 92 S.Ct. 282, 30 L.Ed.2d 254 (1971). Plaintiff here has not suggested any reason for the Baton Rouge authorities to possess any personal animosity towards him, and no showing has been made that plaintiff has been singled out from other Louisiana "fugitives from justice" for the purpose of harassment. Further, since no discovery has yet been conducted, the precise identities of those responsible for initially placing the fugitive from justice entry on the NCIC are known. Thus, while the verified complaint and the affidavits on file evince a reckless and callous disregard for plaintiff's constitutional rights, nevertheless there has been an insufficient showing of the intentional bad faith or harassment necessary to come within one of the exceptions to the *Younger* doctrine. That part of plaintiff's motion which seeks an injunction restraining the pending criminal prosecution must, accordingly, be denied.

[16, 17] Plaintiff's motion also seeks an order that the defendants take the fugitive from justice entry off the NCIC and not re-enter it during the pendency of this action. The *Younger* abstention doctrine does not bar federal courts from enjoining unlawful police conduct where no significant disruption of a pending criminal prosecution would result. *Gerstein v. Pugh*, 420 U.S. 103, 108 n. 9, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Allee v. Medrano*, 416 U.S. 802, 814, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974); *California Dixiecrat Promotions, Inc. v. Musick*, 505 F.2d 278, 282 (9th Cir. 1974); *Lewis v. Kugler*, 446 F.2d 1343, 1346-1348 (3d Cir. 1971); *Bradford v. Wade*, 376 F.Supp. 45, 46 (N.D.Tex.1974). An order requiring that the defendants take the fugitive from justice entry off the NCIC and keep it off would not interfere with the underlying criminal prosecution, since now that the defendants know plaintiff's location, they can request his extradition pursuant to the Uniform Criminal Extradition Act, § 976.03, Wis.Stats. (1973). Furthermore, one of the foundations of the *Younger* doctrine is that the federal plaintiff will be able to

assert his constitutional rights in the state criminal prosecution. Here, however, plaintiff has no assurance that the defendants will ever attempt to formally extradite him and will not simply continue the NCIC entry, resulting in an arrest and detention every time plaintiff comes in contact with a police agency. Thus, if the traditional requisites for preliminary injunctive relief are satisfied, the *Younger* doctrine does not bar an order enjoining the defendants from continuing the NCIC fugitive from justice entry.

C. Injunctive Relief

[18] In *Burns v. Peddicord*, 503 F.2d 18, 28 (4th Cir. 1974), the Court set forth what is required in order that a preliminary injunction issue:

> "A preliminary injunction is proper only where there is a showing that: (1) Plaintiffs have no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (2) the balance of hardships tilts towards plaintiffs; and (3) plaintiffs have at least a reasonable likelihood of success on the merits. * * *."

Plaintiff has adequately established each of these prerequisites.

[19-21] A core concept of the Fourth Amendment is the right to be free from arbitrary and unreasonable interference by police. *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Wolf v. Colorado*, 338 U.S. 25, 27, 69 S.Ct. 1359, 93 L.Ed. 1782 (1948); *Jenkins v. Averett*, 424 F.2d 1228, 1231 (4th Cir. 1970). Repeated arrests without subsequent prosecution is a violation of this Fourth Amendment guarantee. *Maryland v. Hayse*, 315 F.2d 342 (4th Cir. 1963). The fact that the defendants did not personally make the arrests of plaintiff does not extinguish their accountability, since § 1983 explicitly imposes liability on someone who *causes* a deprivation of constitutional rights.

In April 1974, the defendants were given written notice by Assistant District Attorney Gardner of plaintiff's whereabouts. They must, therefore, have decided not to extradite him. Yet because the fugitive from justice entry was left on the NCIC, it was only a matter of time until plaintiff would again be arrested because of the entry. And in October 1974, after plaintiff was arrested, jailed and finally cleared with being a fugitive from justice, the defendants did not forward the necessary extradition documents. They did, however keep the fugitive from justice entry on the NCIC, resulting in plaintiff's third arrest in New York. Once again, defendants did not send the extradition papers.

[22] These facts demonstrate that the defendants have caused plaintiff to be arrested and jailed on three occasions and have not proceeded to extradite him by the proper lawful procedures. The violation of plaintiff's rights by the capricious actions of the defendants is unquestionable.

[23, 24] Where there is a threat of future violations of Fourth Amendment rights, the courts have not hesitated to conclude that there is no adequate legal remedy and that an injunction must issue to prevent irreparable injury. *Bivens v. G.I.O.*, 397 U.S. 456, 90 S.Ct. 1999, 26 L.Ed. 1423 (1970); *Swift & Co. Packers v. Compania Colombiana del Caribe*, 339 U.S. 684, 70 S.Ct. 861, 94 L.Ed. 1206 (1950); *Mitchell v. Cuomo*, 748 F.2d 804 (2d Cir. 1984); *Hall v. Garson*, 468 F.2d 846 (5th Cir. 1972); *Sullivan v. Murphy*, 478 F.2d 938 (D.C.Cir. 1973); *Wulp v. Corcoran*, 454 F.2d 818 (3d Cir. 1972); *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939); *Swift & Co. Packers v. Compania Colombiana del Caribe*, 156 U.S.App.D.C. 23, 476 F.2d 903, 906, cert. denied, 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1973); *Lewis v. Kugler*, 446 F.2d 1343, 1350 (3d Cir. 1971); *Schenk v. City of Chicago*, 107 F.2d 1084 (7th Cir. 1969); *Layton v. Gelston*, 364 F.2d 157 (4th Cir. 1966) (en banc). While damages may be recovered for unconstitutional police and prosecutorial conduct, the remedy does not fully compensate a plaintiff nor deter future misconduct.

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). There is, therefore, a sufficient probability here that plaintiff will be irreparably injured by future arrests based on the NCIC entry.

[27] The final factor in granting a preliminary injunction that must be considered is the balance of hardships. As pointed out above, defendants will not be foreclosed from prosecuting plaintiff, since they can attempt to extradite him by means of Wisconsin law. The irreparable injury to which plaintiff will be subjected in the absence of an injunction necessitates a finding that the balance of hardships is in plaintiff's favor.

It is therefore ordered that the motions to dismiss for improper venue are denied except insofar as they relate to plaintiff's claim arising in New York, to which extent they are granted.

It is further ordered that the motions to dismiss for lack of personal jurisdiction are denied.

It is further ordered that the motions of defendant Brown and Chaffin to dismiss for failure to state a claim are denied, except that the claims for damages against defendant Brown are dismissed.

It is further ordered that plaintiff's motion for an order restraining prosecution of any action which led to the NCIC entry is denied.

It is further ordered that during the pendency of this action, the defendants, their officers, agents, servants, employees, and attorneys, are:

(1) Ordered to cause the fugitive from justice entry concerning plaintiff to be removed from the NCIC system, and

(2) Restrained from entering a fugitive from justice entry concerning plaintiff on the NCIC system.